JUDICIAL CAPACITY AND EXECUTIVE POWER

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INTRODUCTION

THE executive branch of the United States is colossal. Including the armed services, it employs over four million people[1]—more than one percent of the U.S population.[2] Excluding the armed services, its full-time permanent employees number roughly two million,[3] spanning hundreds of agencies, boards, and commissions.[4] Collectively, this bureaucracy generates thousands of new regulations annually and is responsible for administering tens, if not hundreds, of thousands more.[5] It also adjudicates over a million cases, of bewildering variety,[6] and initiates uncountable thousands of enforcement actions.[7] The projected budget of the executive branch for fiscal year 2016 is $4 trillion.[8] This

[1] The Executive Branch, The White House, http://www.whitehouse.gov/1600/executive-branch [https://perma.cc/V3A7-VELE].

[2] Population Clock, U.S. Census Bureau, http://www.census.gov/popclock/ (last visited Feb. 11, 2016) (listing U.S. population at 322,976,547).

[3] Office of Mgmt. & Budget, The Budget for Fiscal Year 2014, Historical Tables 362 tbl.17.1 (2014), http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/hist.pdf [https://perma.cc/9BWQ-UMFT].

[4] See Kenneth F. Warren, Administrative Law in the Political System 37 (5th ed. 2011).

[5] These figures are rough estimates extrapolating from the number of formal notice-and-comment rulemakings reported by Jason and Susan Webb Yackee. See Jason Webb Yackee & Susan Webb Yackee, Delay in Notice and Comment Rulemaking: Evidence of Systemic Regulatory Breakdown?, *in* Regulatory Breakdown: The Crisis of Confidence in U.S. Regulation 163, 167 (Cary Coglianese ed., 2012). Such rulemakings are a small fraction of agencies' total regulatory output. See Cynthia R. Farina, False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive, 12 U. Pa. J. Const. L. 357, 398–99 (2010).

[6] Immigration and social security cases, presided over by immigration judges and administrative law judges ("ALJs"), respectively, account for by far the largest share of this figure. See Office of Planning, Analysis, & Tech., U.S. Dep't of Justice, FY 2013 Statistics Yearbook, at B2 tbl.4 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf [https://perma.cc/95EQ-5MMF] (noting that the Executive Office for Immigration Review adjudicated over 170,000 cases in 2012); Soc. Sec. Admin., Annual Statistical Supplement to the Social Security Bulletin, 2013, at 2.80 tbl.2.F9 (2014), http://www.ssa.gov/policy/docs/statcomps/supplement/2013/supplement13.pdf [https://perma.cc/63ZJ-9VTK] (noting that Social Security ALJs decided over 820,000 cases in 2012). But administrative adjudications run the gamut from consumer protection to interstate trucking to export controls to asset forfeiture to accounting standards. See Office of the Fed. Register, Nat'l Archives & Records Admin., The United States Government Manual 2013, at 120–22, 297–98, 331–34, 541 (2013), http://www.gpo.gov/fdsys/pkg/GOVMAN-2013-11-06/pdf/GOVMAN-2013-11-06.pdf [https://perma.cc/GV9Y-56DZ].

[7] See Office of the Fed. Register, Nat'l Archives & Records Admin., supra note 6.

[8] Office of Mgmt. & Budget, Budget of the United States Government, Fiscal Year 2016, Historical Tables 64 tbl.3.1 (2016), https://m.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/hist.pdf [https://perma.cc/MM3Q-S25L].

figure exceeds the gross domestic product of all but two other countries in the world.[9]

The federal judiciary, by contrast, is Lilliputian. Including the Federal Judicial Center and the Administrative Office of the United States Courts, it totals barely 34,000 employees.[10] Its projected budget for fiscal year 2016 is just $7.7 billion[11]—less than the gross domestic product of Charlottesville, Virginia.[12] Increasingly, scholars have recognized that such a tiny institution could never hope to seriously restrain one as large as the executive branch.[13] Indeed, it is now something of a commonplace that most constitutional law governing executive power is made outside the courts.[14] Nevertheless, from the nondelegation doctrine to the removal power to presidential war powers, calls for more stringent judicial review continue unabated.[15]

Recent Supreme Court decisions have kindled hope—and dismay—that these calls may fall on increasingly receptive ears.[16] Both supporters

[9] GDP (Official Exchange Rate), CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html [https://perma.cc/LPZ9-TJDA].

[10] U.S. Census Bureau, Statistical Abstract of the United States: 2012 § 9 tbl.496, at 326 (2011), http://www2.census.gov/library/publications/2011/compendia/statab/131ed/tables/fedgov.pdf [https://perma.cc/WZ4T-JFW5].

[11] Office of Mgmt. & Budget, supra note 8, at 92 tbl.4.1.

[12] U.S. Dep't of Commerce, Bureau of Econ. Analysis, News Release, Economic Growth Widespread Across Metropolitan Areas in 2013 (2014), http://www.bea.gov/newsreleases/regional/gdp_metro/2014/pdf/gdp_metro0914.pdf [https://perma.cc/3EK6-B89K].

[13] See, e.g., Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 268 (2006). It took more than one hundred Lilliputians to subdue Gulliver, and he was only twelve times their height. See Jonathan Swift, Gulliver's Travels 22, 39 (Claude Rawson ed., 2005).

[14] See, e.g., Mariah Zeisberg, War Powers: The Politics of Constitutional Authority 7 (2013); David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 Harv. L. Rev. 941, 948 (2008); Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314, 2314 (2006); Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 Colum. L. Rev. 1448, 1449 (2010); Deborah N. Pearlstein, Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture, 81 Ind. L.J. 1255, 1256 (2006); Shirin Sinnar, Protecting Rights from Within?: Inspectors General and National Security Oversight, 65 Stan. L. Rev. 1027, 1027 (2013).

[15] See, e.g., Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush 431 (2008); Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1231 (1994); Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2099 (2004); Stephen I. Vladeck, The Unreviewable Executive: *Kiyemba*, *Maqaleh*, and the Obama Administration, 26 Const. Comment. 603, 608 (2010).

[16] See, e.g., Free Enter. Fund v. PCAOB, 561 U.S. 477, 484 (2010); Boumediene v. Bush, 553 U.S. 723, 795 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006). For hopeful re-

and opponents, however, have largely ignored the antecedent question of whether courts are actually capable of restraining executive power—or congressional interference with it—in the ways advocated for.[17] Even scholars more sensitive to institutional limits have overlooked a crucial question: How does the judiciary's limited capacity influence the substance and doctrinal form of judge-made law governing executive power? The answer is vital to explaining the Supreme Court's past executive power decisions. It is also central to the division of constitutional labor between the federal judiciary and other institutional actors.

To address these gaps in the literature, we propose a judicial capacity model of Supreme Court decision making.[18] This model predicts that, in certain important constitutional domains, the limits of judicial capacity create strong pressure on the Supreme Court to adopt hard-edged categorical rules, defer to the political process, or both.[19] The reason is straightforward. In these special domains, a departure from deferential or rule-based decisions would invite more litigation than the Court could handle without sacrificing minimum professional standards.[20]

Applying this seemingly simple model to the constitutional law of executive power yields several substantial payoffs. First, it provides a compelling explanation of long-standing puzzles in the Supreme Court's executive power decisions. Second, it clarifies the nature of the choices available to the Court in future executive power cases as well as the areas in which the Court is likely to be a minor player at best. Finally, it sheds important light on several larger issues of great interest to constitutional theory—namely, judicial competence, judicial independence, and the formalist-functionalist divide in separation of powers.

actions, see Steven G. Calabresi & Christopher S. Yoo, Remove *Morrison v. Olson*, 62 Vand. L. Rev. En Banc 103, 119 (2009); Harold Hongju Koh, Setting the World Right, 115 Yale L.J. 2350, 2354 (2006). For an opposite view, see Aziz Z. Huq, Removal as a Political Question, 65 Stan. L. Rev. 1, 1 (2013); Eric A. Posner & Adrian Vermeule, Accommodating Emergencies, 56 Stan. L. Rev. 605, 644 (2003); Eric A. Posner & Cass R. Sunstein, *Chevron*izing Foreign Relations Law, 116 Yale L.J. 1170, 1170 (2007).

[17] Thomas Merrill, Eric Posner, and Adrian Vermeule are noteworthy exceptions. See Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 9 (2010); Merrill, supra note 15, at 2157.

[18] The model was originally developed by Andrew Coan. See Andrew B. Coan, Judicial Capacity and the Conditional Spending Paradox, 2013 Wis. L. Rev. 339 [hereinafter Coan, Conditional Spending Paradox]; Andrew B. Coan, Judicial Capacity and the Substance of Constitutional Law, 122 Yale L.J. 422 (2012) [hereinafter Coan, Judicial Capacity].

[19] See Coan, Judicial Capacity, supra note 18, at 422.

[20] Id. at 442–43.

The judicial capacity model helps to explain several puzzles in the Supreme Court's past executive power decisions. In particular, the model helps to explain the Court's refusal to limit congressional delegations of power, which the Court has both principled and opportunistic reasons to restrain.[21] It also explains why the Court has failed to meaningfully limit congressional interference with presidential administration, despite the commitment of many conservative Justices to a unitary executive theory of presidential power.[22] In both of these areas, any aggressive attempt at reining in Congress would trigger an avalanche of litigation, almost all of which the Court would feel compelled to review.

The judicial capacity model is similarly helpful in explaining the few areas of executive power in which the Supreme Court has been willing to aggressively invalidate government action.[23] Unlike the areas in which the Court has adopted a deferential posture, these areas tend to be amenable to clear, categorical rules. The Court's blanket prohibitions on legislative and line-item vetoes are two examples.[24] By virtue of their precision, such categorical rules clearly insulate much legislation from constitutional challenge. They also reduce uncertainty among potential litigants and thereby reduce the likelihood of litigation.

There is one conspicuous exception to this generalization: foreign affairs and national security.[25] But here, too, the judicial capacity model helps to explain the Court's approach. In this domain, the volume of potential litigation is sufficiently low that it does not pose a significant threat to the Court's modest capacity. The Court is therefore considerably freer than it is in higher volume domains to employ indeterminate standards to invalidate government action. There may well be reasons for the Court to tread cautiously in foreign affairs and national security, but judicial capacity is not among them.

In addition to explaining past decisions, the judicial capacity model clarifies the nature of the choices available to the Supreme Court in future executive power cases. Specifically, the judicial capacity model predicts that the Court is unlikely to validate either nondelegation or uni-

[21] See infra Part II.
[22] See infra Part III.
[23] See infra Part IV.
[24] See Clinton v. City of New York, 524 U.S. 417, 447 (1998) (prohibiting line-item vetoes); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 917, 959 (1983) (prohibiting legislative vetoes).
[25] See infra Part V.

tary executive principles unless it can do so in the form of hard-edged categorical rules. Given the difficulty that scholars and judges have encountered in formulating such limits,[26] the Court is likely to maintain its deferential posture in these areas going forward.

By contrast, in the area of foreign affairs and national security, where the volume of potential litigation is minimal, the Court enjoys wide flexibility in formulating its decisions. The Court's future decisions in this area will, therefore, be driven largely by factors other than capacity. Put differently, the judicial capacity model helps to define the boundaries of the possible. In so doing, it clarifies when, if at all, it is sensible to urge or expect the courts to play a meaningful role.

Finally, applying the judicial capacity model to executive power sheds important light on several larger issues of great interest to constitutional law and theory—namely, judicial competence, judicial independence, and separation of powers theory. More specifically, the judicial capacity model provides both theoretical and empirical support for chronically under-theorized accounts of judicial competence and independence. In brief, a Court constrained to choose between categorical deference and crudely categorical constitutional limits will often be inferior to institutional decision makers capable of more nuanced responses.[27] Similarly, a capacity-constrained Court will be compelled to avoid many unpopular invalidations of government action because such invalidations would trigger more litigation than the Court could handle.[28]

Last but not least, the judicial capacity model helps to resolve a longstanding mystery in separation of powers theory. Formalism and functionalism are the two leading approaches in this area, among both normative and positive theorists. Neither has any intrinsic bias toward upholding or invalidating government action. Yet the former is invariably invoked to invalidate government action and the latter to uphold it. Judicial capacity explains why. The Court nearly always casts invalidations of government action in the form of formalist rules because such rules discourage litigation. Conversely, the Court virtually always applies functionalist approaches with extreme deference. Otherwise, the

[26] See, e.g., Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 372–77 (2002) (discussing flaws in proposed ways of enforcing the nondelegation doctrine).

[27] See infra Section VI.B.

[28] See infra Section VI.C.

mushy, case-specific standards that define functionalism would bury the Court in new cases it would feel compelled to review.[29]

For all of these reasons, we believe judicial capacity deserves a central place on the agenda of executive power scholarship and constitutional theory more generally. Our argument unfolds as follows. Part I explains the judicial capacity model of Supreme Court decision making. Parts II through V then apply this model to illuminate several puzzles in the Court's executive power decisions. Part VI then draws out the broader implications of this analysis. Finally, Part VII offers several important caveats and clarifications.

I. A JUDICIAL CAPACITY MODEL OF SUPREME COURT DECISION MAKING[30]

The judicial capacity model traces the limits of judicial capacity to the pyramid-like structure of the federal judicial system: ninety-four district courts at the base, thirteen courts of appeals in the middle, and "one Supreme Court" at the apex.[31] Having just one court at the apex—just one court with the authority to make nationally binding decisions of federal law—creates a bottleneck. The capacity of the single court at the top limits the capacity of the whole system below. Though important, structure is not the whole story. Widely held judicial norms also play a crucial role. In particular, the Court's commitment to maintaining minimum professional standards forces the Court to spend substantial time and effort on each case it decides. This commitment limits the Court's capacity to 150 or 200 full-dress decisions per year.[32]

Of course, the Court's jurisdiction is largely discretionary, so it could theoretically stay within this limit simply by refusing to review any more cases.[33] But another widely held judicial norm makes that course

[29] See infra Section VI.D.

[30] The summary of our model provided in this Section incorporates text adapted from Coan, Conditional Spending Paradox, supra note 18, at 356–60.

[31] See U.S. Const. art. III, § 1 ("The judicial power of the United States, shall be vested in *one supreme Court*, and in such inferior Courts as the Congress may from time to time ordain and establish.") (emphasis added); Neil K. Komesar, Law's Limits: The Rule of Law and the Supply and Demand of Rights 40–41 (2001); Richard A. Posner, The Federal Courts: Challenge and Reform 133–34 (1996); Coan, Conditional Spending Paradox, supra note 18, at 356; Coan, Judicial Capacity, supra note 18, at 426–27.

[32] Vermeule, supra note 13, at 268 (suggesting this ceiling on the Supreme Court's capacity).

[33] This makes the Supreme Court a stark contrast to the U.S. Courts of Appeals, whose jurisdiction is nearly all mandatory and that, as inferior courts, lack the Supreme Court's flexibility to discourage litigation through deference and the use of categorical rules. As a

of action unlikely—the Court's commitment to maintaining uniformity in the interpretation and application of federal law. This norm compels the Court to hear enough cases to maintain uniformity and to review lower-court decisions that threaten it.[34] Of particular note, the Court feels especially compelled to review lower-court decisions invalidating a federal law.[35] These commitments—combined with the hierarchical structure of the federal judiciary—starkly limit the volume of litigation the Court can handle. To maintain them, the Court can invite no more than 150 or 200 cases per year that must be decided in order to preserve an acceptable degree of uniformity.

This might not seem difficult, given that the Court currently decides fewer than 100 cases per year,[36] but that appearance is deceiving. Had the Court interpreted the Commerce, Equal Protection, or Takings Clauses differently, demands on its capacity would be vastly higher.[37] Of greater relevance to this Article, the same goes for the nondelegation doctrine and the unitary executive theory. The fact that the Court has shaped constitutional law to avoid overwhelming its limited capacity should not be construed as evidence that this capacity is unlimited or overabundant.

To be sure, the Court does not have control of many factors that influence the volume of federal litigation. The creation of new causes of ac-

result, in the face of sharply rising caseloads, the Courts of Appeals have had no choice but to compromise their commitment to minimum professional standards, dramatically decreasing the fraction of argued cases and dramatically increasing the use of unpublished orders and other forms of summary disposition. William Richman and William Reynolds have aptly described these developments as a system of "Appellate Triage." See William M. Richman & William L. Reynolds, Injustice on Appeal: The United States Courts of Appeals in Crisis 1 (2013); see also Bert I. Huang, Lightened Scrutiny, 124 Harv. L. Rev. 1109, 1113–15 (2011) (finding lower reversal rates of district court rulings during times of higher judicial burdens); Marin K. Levy, Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals, 81 Geo. Wash. L. Rev. 401, 406–07 (2013) (examining rising federal appellate caseloads and suggesting improvements to judicial resource allocation).

[34] Coan, Judicial Capacity, supra note 18, at 428–29; Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1631 (2008) ("[E]nsuring uniformity for its own sake is the Supreme Court's central preoccupation; it is the Court's first order of business and the task to which it devotes the great majority of its time."); see also H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 251 (1991) ("A circuit split is not simply a formal criterion for cert.; it is probably the single most important criterion . . . .").

[35] Coan, Judicial Capacity, supra note 18, at 428, 439 & n.48.

[36] See David R. Stras, The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation, 27 Const. Comment. 151, 153 fig.1 (2010).

[37] Coan, Judicial Capacity, supra note 18, at 428.

tion, the expansion or narrowing of federal jurisdiction, and the supply and affordability of legal services are just a few examples.[38] Yet the existence of factors outside of the Court's control does not change the bottom line. The Court must use the levers at its disposal to ensure that the total volume of litigation does not exceed its modest capacity.

The Court has three principal tools for doing so. First, it can tighten procedural or justiciability requirements for bringing and maintaining a lawsuit.[39] Second, it can make substantive law less friendly to plaintiffs and thereby reduce the expected value of bringing a lawsuit.[40] In the context of constitutional law, this means deferring more extensively to the political process. Third, the Court can employ clearer and more categorical rules for deciding cases, which reduces uncertainty and thereby encourages greater compliance and more frequent settlement outside of court.[41]

In most domains, the Court has fairly wide latitude to choose among these tools or to employ none at all. The Court must avoid exceeding its overall capacity "budget," but it can do so in a number of ways. Thus, the Court can make federal law more generous to plaintiffs or employ vague legal standards—the two main ways in which the Court's decisions invite more litigation—so long as it is willing to make some package of compensating trade-offs in other domains or in the procedural rules that cut across legal domains. Domains in which the Court enjoys this type of flexibility are "normal domains."

Not all domains are normal. In some domains, the nature and volume of litigation that the Court would invite by ignoring the constraints of judicial capacity are such that no procedural recalibration or shifting of

[38] Id. at 434–35.

[39] Id. at 433–34; see also Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 147 (1994) ("[T]he courts can decrease litigation by requiring more forms and procedures, by narrowing the types of cases acceptable for adjudication, by narrowing standing or by increasing the requirements for class action."); Posner, supra note 31, at 95–96 (describing Article III standing as "another form of indirect pricing of federal judicial services," whose relaxation greatly increased the volume of litigation in the 1960s and 1970s).

[40] Komesar, supra note 39, at 147 ("[T]he courts can reduce the number of requests that they review governmental activity by setting out standards that increase the deference given to the reviewed entity.").

[41] Coan, Judicial Capacity, supra note 18, at 433 n.27 ("Categorical rules reduce disuniformity among lower courts by reducing mistakes and making deviation easier to police. They encourage settlement by reducing uncertainty and more closely aligning adverse parties' assessments of the risk-adjusted value of litigation." (citations omitted)).

resources from other areas could stem the tide.[42] As a consequence, to maintain its commitment to minimum professional standards and the uniformity of federal law, the Court has essentially two choices. It can decide these issues using clear-cut categorical rules, as opposed to vague standards, in the hope of reducing disuniformity among lower courts and encouraging settlement out of court. Alternatively, it can adopt more parsimonious standards of liability, reducing the expected value—and thereby the likely volume—of litigation.[43] Where both of these approaches are consistent with the limits of judicial capacity, the Court is free to choose between them on grounds unrelated to capacity. Often, however, the Court will feel compelled to employ both.

Domains of this sort fall into two frequently overlapping categories. The first of these is "high-volume domains." In these domains, the Court does not feel especially strong pressure to maintain a high degree of uniformity, but the volume of litigation that it would invite with a plaintiff-friendly rule or a vague standard would itself exceed the Court's limited capacity. The Equal Protection Clause is a prime example. This Clause applies mostly to state and local regulations. Thus, the Court feels comfortable allowing a large fraction of lower court decisions to go unreviewed because their effect on the uniformity of federal law is relatively small.

Nevertheless, the potential scope of the Equal Protection Clause is so broad that if the Court read it as embodying anything like a stringent and general principle of equal treatment, it would call into question half of the United States Code and a significant fraction of state and local laws, not to mention administrative regulations and executive actions. The resulting volume of litigation would be far more than the Court could handle, even though it would feel free to deny review in a large fraction of cases. It is no surprise, therefore, that the Court has never read the Equal

[42] Id. at 435.

[43] A third option is to employ the canon of constitutional avoidance, which in effect transforms high-stakes constitutional disputes into lower-stakes questions of statutory interpretation. This, in turn, substantially lowers the fraction of cases the Court feels compelled to review, giving it more leeway to restrain government power through the use of vague standards. The canon of constitutional avoidance plays an important role in many domains, including some related to executive power. See, e.g., Cass R. Sunstein & Adrian Vermeule, Libertarian Administrative Law, 82 U. Chi. L. Rev. 393, 414 (2015) [hereinafter Sunstein & Vermeule, Libertarian Administrative Law]; Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 317 (2000) [hereinafter Sunstein, Nondelegation Canons]. Our focus, however, is the constitutional law of executive power. We therefore leave exploration of this tool—and its relation to judicial capacity—for another day.

Protection Clause in this way. Instead, when not treating the Clause as a completely dead letter, the Court has employed a system of tiered scrutiny that amounts to a rule of categorical deference for most forms of discrimination and a rule of categorical invalidity for a small handful of discrete exceptions.[44]

The second sort of domain in which judicial capacity strongly constrains the Court is what we call "high-stakes domains." In these domains, the absolute volume of litigation may or may not be especially great, but the stakes are sufficiently high that the Court feels compelled to grant review of a very large fraction of lower court decisions, especially decisions invalidating government action. The commerce power is a perfect example. Because every law grounded in the commerce power is a federal statute, any lower court decision invoking it will create a serious risk of disuniformity. As already mentioned, the Court feels compelled to grant review of almost any lower court decision invalidating a federal law. On top of this, the commerce power underwrites an enormous quantity of legislation. It is therefore a high-volume as well as a high-stakes domain—what we call a "hybrid domain."[45]

For these reasons, any serious or far-reaching review of the commerce power would generate an avalanche of litigation, nearly all of which the Court would feel compelled to review. It is unthinkable that the Court could keep this up for long. Indeed, the Court has generally adopted a broadly deferential posture toward the commerce power. On the relatively rare occasions when it has engaged in serious review, it has done so in the form of rather hard-edged categorical rules that clearly insulate the vast majority of political action from serious scrutiny—exactly what the judicial capacity model would predict.[46] As we will see, the Court's ex-

[44] See Suzanne B. Goldberg, Equality Without Tiers, 77 S. Cal. L. Rev. 481, 482 (2004).

[45] The constraining force of judicial capacity increases in direct proportion to the potential volume of litigation that the Court would feel compelled review. This, in turn, is a function of the overall volume of potential litigation and the fraction of that volume that the Court would feel compelled to review. The former is captured by what we call "high-volume" domains and the latter by what we call "high-stakes" domains. Both volume and stakes, of course, fall along a spectrum.

[46] *United States v. Lopez* and *NFIB v. Sebelius* are good examples. The former made clear that all federal regulations of economic activity—the vast majority—remained subject to the extremely deferential rational-basis test. See United States v. Lopez, 514 U.S. 549, 557 (1995). The latter is explicit that its reading of the Commerce Clause (broadly shared by the Chief Justice and the four joint dissenters) threatens only a single federal statute. See NFIB v. Sebelius, 132 S. Ct. 2566, 2586 (2012) ("Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.").

ecutive power decisions generally, though not always, follow a similar pattern.

II. DELEGATION AND DEFERENCE

For nearly two centuries, the Supreme Court has acknowledged that the Constitution limits Congress's ability to delegate its legislative power to the executive branch.[47] Over that same period, and especially since the New Deal, Congress has delegated enormous power to federal agencies as it erected the modern regulatory state.[48] Legal scholars have long urged the Court to intervene and limit this unbridled delegation.[49] Yet the Court has generally refused this invitation, invoking the nondelega-

The Court's early New Deal decisions are notable exceptions, but ones that go some distance toward proving the rule. Almost immediately, these decisions produced a huge influx of litigation, which may well have been part of Justice Roberts's decision to retreat in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). See Richard H. Pildes, Is the Supreme Court a "Majoritarian" Institution?, 2010 Sup. Ct. Rev. 103, 130 (noting that "[i]n the summer of 1935, more than 100 district judges held acts of Congress unconstitutional, issuing more than 1,600 injunctions against New Deal legislation"). It is virtually impossible to imagine the Court keeping up with this sort of workload for long.

[47] Lisa Schultz Bressman, Essay, *Schechter Poultry* at the Millennium: A Delegation Doctrine for the Administrative State, 109 Yale L.J. 1399, 1403 (2000); Patrick M. Garry, Accommodating the Administrative State: The Interrelationship Between the *Chevron* and Nondelegation Doctrines, 38 Ariz. St. L.J. 921, 928 (2006).

[48] See Paul Diller, Habeas and (Non-)Delegation, 77 U. Chi. L. Rev. 585, 634 (2010) ("Congress's delegation of vast amounts of authority to the executive branch has enabled and, in turn, been facilitated by, the rise of the administrative state."); Sandra B. Zellmer, The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal, 32 Ariz. St. L.J. 941, 942 (2000) ("More than half a century has passed since the New Deal, the era known for ushering in the modern administrative state, where broad-sweeping regulatory powers were delegated to over a dozen new executive agencies pursuant to a raft of social legislation.").

[49] For a sampling, see, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 132–34 (1980); James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government 93–94 (1978); David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 195–97 (1993); Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 580–86 (2000); Marci A. Hamilton, Representation and Nondelegation: Back to Basics, 20 Cardozo L. Rev. 807, 822 (1999); Julian G. Ku, The Delegation of Federal Power to International Organizations: New Problems with Old Solutions, 85 Minn. L. Rev. 71, 119–20 (2000); Lawson, supra note 26, at 351; Theodore J. Lowi, Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power, 36 Am. U. L. Rev. 295, 295–96 (1987); David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 Mich. L. Rev. 1223, 1254 (1985); J. Skelly Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 582–87 (1972) (reviewing Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (1971)).

tion doctrine just twice in its history.[50] Such restraint is puzzling given that the Court has both principled and opportunistic reasons to oppose the expansion of the federal regulatory state.

This Part applies the judicial capacity model to help explain the Court's historical reluctance to apply the nondelegation doctrine. The gist of our argument is that the nondelegation doctrine is peculiarly unsuited to clear categorical rules, and the uncertainty created by a vague standard would invite an avalanche of litigation. Unable to enforce the nondelegation doctrine without overwhelming its capacity, the Court has felt strongly compelled to defer to the political process.

A. The Nondelegation Doctrine

The nondelegation doctrine has its roots in Article I, Section One of the Constitution, which vests "[a]ll legislative Powers" in Congress.[51] By vesting Congress with *all* legislative power, the Constitution arguably bars Congress from delegating its legislative power to the executive branch.[52] Article II, however, vests "*[t]he* executive Power" in the President,[53] and executing the laws inevitably involves some discretion.[54] Moreover, the exercise of such discretion on a large scale virtually necessitates the establishment of general rules to govern the functions of subordinate officials and to provide notice to regulated parties. At what point does such rulemaking cross the line from executive to legislative

[50] See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935). As Cass Sunstein memorably put it, the nondelegation doctrine has had one good year and more than two hundred bad ones. See Cass R. Sunstein, Is the Clean Air Act Unconstitutional?, 98 Mich. L. Rev. 303, 330 (1999).

[51] See U.S. Const. art. I, § 1 ("*All legislative Powers* herein granted *shall be vested* in a Congress of the United States, which shall consist of a Senate and House of Representatives."(emphasis added)).

[52] See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers." (quoting U.S. Const. art. I, § 1)). But see id. at 489 (Stevens, J., concurring) ("In Article I, the Framers vested 'All legislative Powers' in the Congress, just as in Article II they vested the 'executive Power' in the President. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others." (citations omitted)).

[53] U.S. Const. art. II, § 1, cl. 1 ("*The* executive Power shall be vested in a President of the United States of America." (emphasis added)).

[54] See Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action.").

power? The answer is hazy at best.[55] The core purpose of the nondelegation doctrine, however, is to preserve the distinction between legislative power, vested in Congress, and executive power, vested in the President.[56]

The Supreme Court has recognized the nondelegation doctrine as a constitutional principle since at least the late nineteenth century,[57] if not earlier.[58] In its early decisions, the Court broadly pronounced that Congress may not delegate legislative power. For example, in *Field v. Clark*, the Court declared: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[59] Despite this bold talk, the Court upheld every congressional delegation it encountered.[60] For instance, the Court allowed Congress to lay out general guidelines, while delegating the responsibility to "fill up the details."[61]

[55] See Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry . . . .").

[56] See Garry, supra note 47, at 926 ("[T]he nondelegation doctrine strives to draw a line, though obviously a very fine line, between legislating and simply delegating some lawmaking authority to those charged with executing a congressional enactment.").

[57] See Field v. Clark, 143 U.S. 649, 692 (1892).

[58] Some scholars trace the Supreme Court's recognition of nondelegation principles to *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 386 (1813). See, e.g., Richard J. Pierce, Jr. et al., Administrative Law and Process 49 (4th ed. 2004). *Aurora* involved a challenge to a statute that empowered the President to revive trade restrictions on countries that violated the neutral commerce of the United States. *Aurora*, 11 U.S. (7 Cranch) at 382–83, 388. The appellant argued that this statute constituted an unconstitutional congressional delegation of legislative power to the President. Id. at 386. The Court dismissed this argument in one sentence: "[W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct." Id. at 388.

[59] 143 U.S. at 692.

[60] See, e.g., Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 284 (1933); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 25–27 (1932); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 408 (1928); United States v. Grimaud, 220 U.S. 506, 521 (1911); Buttfield v. Stranahan, 192 U.S. 470, 496 (1904); *Field*, 143 U.S. at 692; Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825); *Aurora*, 11 U.S. (7 Cranch) at 387–88.

[61] *Wayman*, 23 U.S. (10 Wheat.) at 43 (upholding a legislative grant of authority to the federal courts to adopt their own rules of process); see also *Grimaud*, 220 U.S. at 518 (upholding a delegation "to make rules and regulations" for importing tea).

The Court attempted to synthesize its nondelegation precedent in *J.W. Hampton, Jr. & Co. v. United States*.[62] This famous case involved a challenge to the Tariff Act of 1922, which delegated to the President the power to adjust tariffs if rates failed to "equalize . . . differences in costs of production."[63] In upholding the Act, the Court announced what is now the litmus test for acceptable congressional delegation: Congress may delegate legislative authority, as long as it provides an "intelligible principle" to guide the exercise of the delegated authority.[64] At least ostensibly, the requirement of an intelligible principle distinguishes legislation—exercising unguided rulemaking authority—from execution of the law—carrying into effect an intelligible principle.

Yet, the Supreme Court has only twice in its history invoked the nondelegation doctrine to strike down legislation. Both instances occurred in 1935 at the height of the Court's resistance to the New Deal, and both involved the same law. First, in *Panama Refining Co. v. Ryan*, the Court invalidated a provision in the National Industrial Recovery Act ("NIRA"), which authorized the President to prohibit the shipment of oil produced in excess of quotas.[65] Again, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down another provision in the NIRA, which empowered the President to approve "codes of fair competition" for trades and industries.[66] These cases, however, are frequently dismissed as attempts by the Supreme Court to undermine New Deal legislation.[67] While never formally overruled, they have had little effect on subsequent doctrine.

Indeed, since 1935, the Court has upheld every congressional delegation it has reviewed. Interestingly, the Court has continued to trot out the nondelegation doctrine and insist that Congress provide an intelligible principle to guide the execution of delegated authority.[68] But, in practice,

[62] 276 U.S. 394 (1928).

[63] Id. at 401.

[64] Id. at 409 ("If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." (emphasis added)).

[65] 293 U.S. 388, 430 (1935).

[66] 295 U.S. 495, 541–42 (1935).

[67] See, e.g., Stephen L. Carter, From *Sick Chicken* to *Synar*: The Evolution and Subsequent De-Evolution of the Separation of Powers, 1987 BYU L. Rev. 719, 729 (1987); Evan J. Criddle, When Delegation Begets Domination: Due Process of Administrative Lawmaking, 46 Ga. L. Rev. 117, 143 (2011); Garry, supra note 47, at 931–32.

[68] See, e.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–74 (2001); Loving v. United States, 517 U.S. 748, 771–72 (1996); Touby v. United States, 500 U.S. 160, 167–68

Congress delegates vast amounts of power to agencies through statutes written in expansive language. For instance, the Court has upheld delegations guided by such nebulous standards as "public convenience, interest, or necessity,"[69] "fair and equitable" prices,[70] "just and reasonable" rates,[71] and "excessive" profits.[72] In effect, the Court has transformed the intelligible principle requirement into a rule of categorical deference—so long as Congress offers *some* guidance, the Court will uphold the delegation.[73] As a result, conventional wisdom holds that the nondelegation doctrine is dead,[74] or at least unenforceable.[75]

B. Doctrinal Puzzle

The Supreme Court's abject deference to Congress's delegations of its legislative power is puzzling, under both legal and social science theories of judicial decision making. Applied vigorously, the nondelegation doctrine would be a powerful tool for limiting the federal regulatory state. This potential should make the nondelegation doctrine an attractive tool for conservative Justices, eager to limit federal power and pro-

(1991); Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218–20 (1989); Mistretta v. United States, 488 U.S. 361, 371–74 (1989).

[69] United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968) (upholding a delegation to the Federal Communications Commission ("FCC") to issue rules and regulations as "public convenience, interest, or necessity requires").

[70] Yakus v. United States, 321 U.S. 414, 427 (1944) (upholding a delegation to the Price Administrator to fix commodity prices that would be "fair" and "equitable").

[71] Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 600 (1944) (upholding a delegation to the Federal Power Commission to determine "just and reasonable" rates).

[72] Lichter v. United States, 334 U.S. 742, 778 (1948) (upholding a delegation to determine "excessive profits").

[73] See Diller, supra note 48, at 634 ("Since 1935, the 'intelligible principle' requirement has been rendered virtually meaningless . . . ."); Lawson, supra note 26, at 371 ("After 1935, the Court abandoned any serious nondelegation analysis. Subsequent cases announced the search for an 'intelligible principle' and declared it satisfied by any collection of words that Congress chose to string together.").

[74] See, e.g., Larry Alexander & Saikrishna Prakash, Essay, Delegation Really Running Riot, 93 Va. L. Rev. 1035, 1038 (2007) (noting that the nondelegation doctrine is "on life support, with the Supreme Court neither willing to pull the plug nor prepared to revive it"); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2364 (2001) ("It is, after all, a commonplace that the nondelegation doctrine is no doctrine at all.").

[75] See Garry, supra note 47, at 938 ("As demonstrated by the past seven decades of case law, the nondelegation doctrine has become virtually unenforceable."); see also Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (noting that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

mote economic laissez-faire.[76] Even for liberal Justices, who tend to be broadly supportive of the regulatory state, the temptation to opportunistically invalidate conservative regulations should arise with some frequency. Indeed, scholars have repeatedly called on the Court to exhume the nondelegation doctrine for various reasons,[77] and Justices have occasionally seemed inclined to do so.[78] Yet for eighty years, the Court has stayed its hand and refused to enforce the nondelegation doctrine. If Supreme Court decisions are driven primarily by ideology, as political scientists generally contend,[79] this restraint is difficult to understand.

It is also difficult to understand if judges are motivated by legal factors.[80] Of course, it is possible to argue that the Constitution does not, in fact, bar congressional delegation of legislative authority.[81] That is decidedly a minority position.[82] But whatever its merits, denying the validity of the nondelegation doctrine does not explain the Court's historical treatment of the doctrine. Crucially, the Court continues to accept the nondelegation doctrine as a constitutional principle and continues to reiterate the intelligible principle test, albeit in a very deferential form.[83] In

[76] See, e.g., City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (citing other recent cases raising similar concerns to note "[i]t would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed").

[77] See supra note 49.

[78] See, e.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."); Indus. Union Dep't v. Am. Petrol. Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring) (arguing that a provision of the Occupational Safety and Health Act of 1970 violated the nondelegation doctrine).

[79] See, e.g., Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 86 (2002); Jeffery A. Segal & Chad Westerland, Are Supreme Court Justices Merely "Legislators in Robes"? 2 (2011) (unpublished manuscript), https://wwwprinceton.edu/csdp/events/Segal12152011/Segal12152011.pdf [https://perma.cc/7QRS-6GWB].

[80] See Martin H. Redish, The Constitution as Political Structure 135 (1995) ("Purely as a matter of constitutional theory, it is difficult to understand the Court's abandonment of the limits on delegation.").

[81] Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1722 (2002) ("In our view, there just is no constitutional nondelegation rule, nor has there ever been.").

[82] See Cynthia R. Farina, Deconstructing Nondelegation, 33 Harv. J.L. & Pub. Pol'y 87, 89 (2010) ("The existence of a constitutional nondelegation principle is typically accepted as given . . . .").

[83] See, e.g., *Whitman*, 531 U.S. at 472 ("Article I, § 1, of the Constitution vests '[a]ll legislative powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers."(quoting U.S. Const. art. I, § 1)).

fact, the Supreme Court generally upholds congressional delegations in overwhelming fashion.[84] Though observers may be willing to inter the nondelegation doctrine, the Court evidently is not. Given that the Court is willing to recognize the doctrine, why does the Court refuse to enforce it?

It is possible to argue that the nondelegation doctrine presents a difficult line-drawing problem—distinguishing legislative power from executive power.[85] Indeed, it does. But the Court is willing to draw constitutional lines in other contexts.[86] For example, the Court has repeatedly fashioned categorical rules to limit the federal commerce power,[87] and has also incorporated vague standards of reasonableness into various strands of Fourth Amendment doctrine.[88] With so many ideological temptations to invalidate disfavored regulations or to roll back the regulatory state more generally, it is genuinely puzzling why the Court would not take one of these approaches in the context of the nondelegation doctrine.

C. Judicial Capacity Model Applied

If the Supreme Court has both the opportunity and motivation to vigorously enforce the nondelegation doctrine, why has it consistently refused to do so? The judicial capacity model helps to explain the Court's restraint.

The nondelegation doctrine is both a high-volume and a high-stakes domain. Congressional delegation of power underpins the entire federal

[84] See Gary Lawson, Federal Administrative Law 114 (6th ed. 2013) ("In the slightly more than one decade from *Mistretta* through *American Trucking*, the combined vote in the Supreme Court on the merits of nondelegation challenges was 53-0 against the challenges.").

[85] See, e.g., John F. Manning, Lessons from a Nondelegation Canon, 83 Notre Dame L. Rev. 1541, 1551 (2008) ("The question in the standard, garden-variety nondelegation case—how much discretion is too much—simply does not lend itself to principled line drawing.").

[86] See Redish, supra note 80, at 136–37 (arguing that the nondelegation doctrine's line drawing problem is "no greater than those facing the Court in attempting to delineate the scope of numerous other constitutional concepts").

[87] See NFIB v. Sebelius, 132 S. Ct. 2566, 2587 (2012) (drawing a distinction between activity and inactivity); United States v. Morrison, 529 U.S. 598, 610 (2000) (drawing a distinction between economic and noneconomic activities); United States v. Lopez, 514 U.S. 549, 559–60 (1995) (drawing a distinction between economic and noneconomic activities).

[88] See Terry v. Ohio, 392 U.S. 1, 27 (1968) (upholding brief investigative detentions when based on reasonable suspicion); Katz v. United States, 389 U.S. 347, 351–52 (1967) (extending Fourth Amendment protection to areas where a person has a reasonable expectation of privacy).

regulatory state. Today, the federal regulatory state encompasses hundreds of agencies, which employ millions of officials, who execute innumerable tasks.[89] Legions of federal statutes support this system, not to mention the fifty-volume Code of Federal Regulations.[90] If the Court decided to vigorously enforce the nondelegation doctrine, it would call into question the entire regulatory state and its attendant laws and regulations.[91] It would also unravel two centuries of precedent.[92] The resulting volume of litigation would be enormous. On top of this, any time a lower court strikes down a congressional delegation of authority, it always invalidates a federal law, meaning that the Court feels strongly compelled to grant review. Thus, a robust reading of the nondelegation doctrine would trigger an avalanche of litigation, almost all of which the Court would feel compelled to review.

For these reasons, judicial capacity imposes a major constraint on how the Supreme Court interprets the nondelegation doctrine. In particular, the judicial capacity model predicts that the Court will feel strong pressure to employ hard-edged categorical rules, defer to the political process, or both. The nondelegation doctrine, however, is peculiarly unsuited to bright-line rules. Simply put, it is exceedingly difficult to draw a clear distinction between legislative power and executive power. In very broad terms, legislative power involves rulemaking, whereas executive power involves implementation and enforcement of rules made elsewhere. But that distinction quickly breaks down. No rule is entirely precise, and thus some judgments must be left to those executing the rule.[93] As a consequence, the implementation and enforcement of rules often take the form of promulgating substantive rules, i.e., rulemaking.[94] In Justice Scalia's words, "a certain degree of discretion, and thus of

[89] See supra notes 1–9 and accompanying text.

[90] See Farina, supra note 5, at 397 ("[T]housands of statutes delegate regulatory power to hundreds of administrative units with formal policymaking authority."); see also 50 C.F.R. (2015) (final volume of 50-volume series).

[91] See Diller, supra note 48, at 634 ("The courts' hesitance to invoke the nondelegation doctrine stems in part from a reluctance to gum up the workings of modern government, in which behemoth agencies . . . exercise vast amounts of power.").

[92] See Peter B. McCutchen, Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best, 80 Cornell L. Rev. 1, 2 (1994) ("[T]o declare the administrative state unconstitutional would require the Court to overrule an immense and deeply rooted body of precedent.").

[93] See Lawson, supra note 26, at 339; Manning, supra note 85, at 1551.

[94] See Lawson, supra note 84, at 11 ("When an agency engages in *rulemaking*, it does something that looks very much like a legislature passing law.").

lawmaking, *inheres* in most executive or judicial action."[95] The upshot is that the Court cannot enforce the nondelegation doctrine through a hard-edged distinction between legislative and executive power—no such distinction exists.[96]

Unable to cleanly delineate legislative power from executive power, the Court might decide to instead formulate the nondelegation doctrine in terms of a standard. To do so, however, the Court would need to say how much rulemaking authority is too much for an agency to exercise.[97] Such an unquantifiable standard would cast a pall of uncertainty over all congressional delegations.[98] With uncertainty comes litigation. Apart from any uncertainty, such a vague standard would also threaten a large fraction of federal statutes, many of which delegate enormous power to agencies in the broadest possible terms.[99] The Court simply could not handle the volume of litigation it would invite (and feel compelled to review) by rigorously enforcing an amorphous nondelegation doctrine.[100] Viewed through the lens of judicial capacity, it is therefore no surprise that the Court has not attempted to enforce a standard-like nondelegation doctrine.

Constrained by capacity and unable to fashion hard-edged categorical rules, the Court has just one available avenue to avoid overwhelming its limited capacity: defer to congressional delegations and interpret the

[95] Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

[96] Sunstein, Nondelegation Canons, supra note 43, at 321 ("Because the relevant questions are ones of degree, the nondelegation doctrine could not be administered in anything like a rule-bound way . . . .").

[97] See id. at 326–27 ("The distinction between 'executive' and 'legislative' power cannot depend on anything qualitative; the issue is a quantitative one. The real question is: How much executive discretion is too much to count as 'executive'? No metric is easily available to answer that question."); see also *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) ("[T]he debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.").

[98] See Sunstein, Nondelegation Canons, supra note 43, at 326–27 ("[T]he overwhelming likelihood is that judicial enforcement of the doctrine would produce ad hoc, highly discretionary rulings, giving little guidance to lower courts or to Congress itself.").

[99] See, e.g., United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968) (considering delegation to the FCC to issue rules and regulations as "public convenience, interest, or necessity requires.").

[100] It is the Court's commitment to reviewing essentially every lower-court decision invalidating a federal law that distinguishes nondelegation doctrine from other domains in which the Court has employed vague constitutional standards. The Fourth Amendment, for example, generates an enormous volume of litigation, but most decisions are so fact-specific and so limited in their effect that the Court feels compelled to review only a tiny fraction of them.

nondelegation doctrine narrowly. That is, in fact, precisely what we see when we examine the Court's historical treatment of the nondelegation doctrine. Apart from two decisions in 1935, the Court has never invalidated legislation on nondelegation grounds.[101] In the process, the Court has adopted a broadly deferential posture toward congressional delegation. The difficulty of imposing narrow categorical limits on congressional delegations explains the Court's historically deferential approach to delegations the Court might otherwise be tempted to strike down.

Of course, there may be other explanations for the Court's deference to congressional delegation of power to agencies. For example, the Court may be hampered by a self-protective reluctance to challenge Congress.[102] But even this motive may come back to judicial capacity. One powerful reason to avoid mounting a sustained challenge to the political branches is the large volume of litigation such challenges inevitably produce.[103] Alternatively, the Court may doubt its competence to distinguish permissible from impermissible delegations. But this motive too may come back to judicial capacity. After all, it is the constraints of judicial capacity that force the Court to eschew more subtle and sensitive standards in favor of crude and clumsy categorical rules. In other words, the constraints of judicial capacity are themselves an important cause of the Court's limited competence in high-stakes and high-volume domains.[104]

At a minimum, judicial capacity is a plausible and fully sufficient explanation for the Court's categorically deferential approach to congressional delegations. Its premises are clear and well supported, and the pattern of the Court's decisions are fully consistent with its predictions. That it is also a but-for cause of variance in Supreme Court decisions is suggested by the Court's greater willingness to challenge Congress in contexts more amenable to bright-line rules, which protect the Court against capacity overload.[105] Finally, to the extent that other constraints

[101] See supra note 50.

[102] See McCutchen, supra note 92, at 2 ("The Court's unwillingness to [invoke the nondelegation doctrine] is, in large part, pragmatic. Even if the Court were disposed to order the task of dismantling the federal bureaucracy, it might not have the political capital necessary to realize its objective.").

[103] For more on this, see infra Section VI.C.

[104] For more on this, see infra Section VI.B.

[105] See infra Part IV.

on the Court may be eroding with time,[106] the judicial capacity model provides an important reason to expect that the Court's decisions will remain restrained, at least in high-volume and high-capacity domains like the nondelegation doctrine.

III. REMOVAL AND THE UNITARY EXECUTIVE

A number of Justices on the Supreme Court—perhaps even a majority—subscribe to a unitary executive theory of presidential power.[107] On this view, Article II vests in the President complete authority over discretionary decision making in the executive branch.[108] In reality, however, Congress exerts enormous influence over the federal bureaucracy. Yet the Court has never made any serious attempt to curb this congressional interference. When the Court has invoked the unitary executive theory, it has done so only to place modest limits on a single, relatively unimportant mechanism of congressional control—good cause restrictions on the removal of executive officers.

The Court's nearly wholesale deference to congressional interference with presidential administration is puzzling for several reasons. First, a number of Justices are ideologically committed to the unitary executive

[106] For a persuasive argument to this effect, see Richard H. Pildes, supra note 46, at 105–06 (arguing that fear of political retaliation and the politics of the appointments process are less likely to constrain the Court than they have in the past).

[107] Justice Thomas signaled his support for the theory in *Hamdan v. Rumsfeld*, 548 U.S. 557, 679 (2006) (Thomas, J., dissenting) and in *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting). Chief Justice Roberts and Justice Alito joined one of Justice Scalia's opinions advocating for unitary executive control. See FCC v. Fox Television Stations, Inc., 556 U.S. 502, 523–28 (2009) (Part III-E). Justice Kennedy seemed to endorse unitary executive principles by joining in the majority opinion in *Printz v. United States*, 521 U.S. 898, 922–23 (1997) ("The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known."). Justice Kagan has endorsed a version of the unitary executive theory. See generally Kagan, supra note 74, at 2252 (arguing that the "presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism"). See also Jeffrey Rosen, The Roberts Court & Executive Power, 35 Pepp. L. Rev. 503, 503 (2008) (stating that the four conservative justices were shaped by the unitary executive theory); Matthew A. Smith, Delegating Away the Unitary Executive: Reviewing INA § 287(g) Agreements Through the Lens of the Unitary Executive Theory, 8 Duke J. Const. L. & Pub. Pol'y 197, 207 (2013) ("The unitary executive theory has emerged as an influential interpretation of Article II that is capable of marshaling the support of a majority of the Justices.").

[108] See Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1166 (1992).

theory.[109] Second, requiring complete presidential control over the bureaucracy would make Congress less enthusiastic about delegating power, which in turn would slow the growth of the administrative state.[110] This should be appealing to conservative Justices.[111] Third, even liberal Justices should have opportunistic reason to strike down interference with presidential control during Democratic administrations, especially when Republicans control Congress. Finally, the legal rationale for striking down removal restrictions is fully applicable to other forms of congressional interference; they all impede the President's executive power under the Vesting and Take Care Clauses.

This Part applies the judicial capacity model to explain the Supreme Court's deference to congressional interference with presidential administration. In a nutshell, we argue that any serious effort to validate the unitary executive theory would call into question a vast amount of federal legislation and bury the Court in litigation it would feel strongly compelled to review. The Court, therefore, only validates unitary executive principles when it can do so in the form of relatively narrow categorical rules, which insulate most congressional action from constitutional challenge and encourage settlement as to those actions they invalidate.

A. The Underenforced Unitary Executive

In theory, the nondelegation doctrine governs the extent to which Congress can surrender its power to the executive branch. But after surrendering power, Congress often seeks to retain some measure of control over its exercise.[112] At least nominally, many conservative judges and academics insist that such congressional control is almost always uncon-

[109] See supra note 107.

[110] See infra note 164 and accompanying text.

[111] See, e.g., City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) ("It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed.").

[112] See Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. 61, 69 (2006); J.R. DeShazo & Jody Freeman, The Congressional Competition to Control Delegated Power, 81 Tex. L. Rev. 1443, 1456–59 (2003); Huq, supra note 16, at 54; Kagan, supra note 74, at 2255–60; Jonathan R. Macey, Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies, 80 Geo. L.J. 671, 672–73 (1992); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431, 433 (1989) [hereinafter McNollgast].

stitutional.[113] On this view, if power can be exercised by the President or a federal agency, it must be executive, rather than legislative power, and Article II vests *all* executive power in the President.[114] Article II also imposes on the President—and no one else—a duty to "take Care that the Laws be faithfully executed."[115] Congressional action that impairs the President's ability to carry out this function or transfers it to others must therefore be unconstitutional. This is known as "the unitary executive theory,"[116] and it lies at the heart of some of the most notable executive power disputes in American history.

Despite the commitment of many Justices to this theory, the Court has never made any serious attempt to limit pervasive congressional interference with presidential administration.[117] This interference takes myriad forms. The creation of independent agencies is an obvious example that receives much attention.[118] But Congress wields many other tools to influence and control federal agencies. Congress can alter an agency's structure or jurisdiction, cut agency personnel, require agencies to give notice before taking action, mandate consultation with other agencies,

[113] For a sampling of some of the scholarship, see Calabresi & Yoo, supra note 15; Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541 (1994); Calabresi & Rhodes, supra note 108; Louis Fisher, The Unitary Executive and Inherent Executive Power, 12 U. Pa. J. Const. L. 569 (2010); Lawson, supra note 15, at 1231; Neomi Rao, Removal: Necessary and Sufficient for Presidential Control, 65 Ala. L. Rev. 1205 (2014); John Yoo, Unitary, Executive, or Both?, 76 U. Chi. L. Rev. 1935 (2009).

[114] See Yoo, supra note 113, at 1938 ("Article II, § 1's Vesting Clause grants all of the federal executive power to the president alone . . . ."); see also Morrison v. Olson, 487 U.S. 654, 709 (1988) (Scalia, J., dissenting) ("It is not for [the courts] to determine . . . how much of the purely executive powers of the government must be within the full control of the President. The Constitution prescribes that they *all* are.").

[115] U.S. Const. art. II, § 3.

[116] See Calabresi & Rhodes, supra note 108, at 1158.

[117] See Lawson, supra note 15, at 1244 ("No modern judicial decision specifically addresses the President's power either directly to make all discretionary decisions within the executive department or to nullify the actions of insubordinate subordinates. Instead, debate has focused almost exclusively on whether and when the President must have unlimited power to *remove* subordinate executive officials.").

[118] See, e.g., Kent H. Barnett, Avoiding Independent Agency Armageddon, 87 Notre Dame L. Rev. 1349, 1349 (2012); Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 Cornell L. Rev. 769, 782 (2013) (arguing that agencies fall along a continuum of independence defined by an array of structural features including but not limited to removal protections); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 106–08 (1994); Neomi Rao, A Modest Proposal: Abolishing Agency Independence in *Free Enterprise Fund v. PCAOB*, 79 Fordham L. Rev. 2541, 2553 (2011); Kevin M. Stack, Agency Independence After *PCAOB*, 32 Cardozo L. Rev. 2391, 2392–93 (2011).

require congressional review of proposed rules, order performance reviews, threaten special hearings, and cut or impose conditions on funding.[119] In addition, Congress can prod agencies through more informal channels via language in committee reports, instructions during committee hearings, correspondence from congresspersons to committee heads, and oversight hearings.[120] Last and perhaps most significantly, the Administrative Procedure Act[121] itself functions as a powerful and sweeping restraint on the President's power to control administrative decision making.[122] So potent are these tools in combination that the leading political science view of executive-legislative relations is known as the "congressional dominance theory."[123]

Galled by this widespread congressional interference, unitary executive theorists have clamored for judicial intervention.[124] The Court, however, has refused to meaningfully scrutinize the overwhelming majority of ways in which Congress interferes with presidential administration. The only exception is a small handful of decisions invoking unitary executive principles to limit congressional restrictions on the removal of high-level executive officers. Notably, the text of the Constitution says nothing expressly about the President's removal power,[125] and the Fram-

[119] See Anthony M. Bottenfield, Congressional Creativity: The Post-*Chadha* Struggle for Agency Control in the Era of Presidential Signing Statements, 112 Penn St. L. Rev. 1125, 1144–46 (2008); DeShazo & Freeman, supra note 112, at 1456–57; Thomas O. McGarity, Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age, 61 Duke L.J. 1671, 1711–13 (2012).

[120] See Bottenfield, supra note 119, at 1147; McGarity, supra note 119, at 1711–13.

[121] Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012).

[122] For the classic account, see McNollgast, supra note 112, at 442. For a sampling of the substantial literature it has spawned, see DeShazo & Freeman, supra note 112, at 1448 (refining McNollgast's model to account for multiple congressional principals); Jonathan R. Macey, Organizational Design and Political Control of Administrative Agencies, 8 J.L. Econ. & Org. 93, 99–102 (1992) (identifying a range of structural mechanisms through which Congress influences agency policy making); David B. Spence, Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies, 28 J. Legal Stud. 413, 413 (1999) (providing significant but qualified empirical support for McNollgast model).

[123] See DeShazo & Freeman, supra note 112, at 1456–58 (surveying the congressional dominance theory literature).

[124] See, e.g., Hans Bader, *Free Enterprise Fund v. PCAOB*: Narrow Separation-of-Powers Ruling Illustrates that the Supreme Court Is Not "Pro-Business," 2010 Cato Sup. Ct. Rev. 269, 284 (discussing the *Free Enterprise Fund v. PCAOB* decision and arguing: "If the Supreme Court had any sympathy for American business at all, it would have struck the law down in its entirety."); Lawson, supra note 15, at 1245 (bemoaning "[t]he death of the unitary executive").

[125] See Morrison v. Olson, 487 U.S. 654, 723 (1988) (Scalia, J., dissenting) ("There is, of course, no provision in the Constitution stating who may remove executive officers . . . .");

ers did not discuss the power at the Constitutional Convention.[126] Nevertheless, the Court has inferred from general language in Article II[127] that the President must have some power to remove executive officials.[128] Despite recognizing the President's removal authority, the Court has adopted a broadly deferential stance toward congressional interference with that authority. On the rare occasions when the Court has intervened, it has done so in the form of narrow, categorical rules.

The Supreme Court took its first stab at interpreting the President's removal power in 1926, when it decided *Myers v. United States*.[129] *Myers* involved a challenge to a statute that required the President to secure the advice and consent of the Senate before removing a postmaster first-class.[130] Chief Justice (and former President) Taft penned the lengthy majority opinion that chronicled the judicial, political, and scholarly history of the removal power. Ultimately, *Myers* struck down the restriction on removal of the postmaster.[131] In so doing, *Myers* seemed to grant the President absolute authority to remove the officials he appointed.[132]

The Court quickly backed away from *Myers*. Just nine years later, the Court reversed direction in *Humphrey's Executor v. United States*.[133] Decided at the height of the New Deal, *Humphrey's Executor* arose when President Franklin Roosevelt removed a Commissioner of the Federal Trade Commission for political reasons.[134] Congress had provid-

Ex parte Hennen, 38 U.S. (13 Pet.) 230, 258 (1839) ("The Constitution is silent with respect to the power of removal from office . . . .").

[126] Myers v. United States, 272 U.S. 52, 109–10 (1926) ("The [removal power] was not discussed in the Constitutional Convention."); see also Free Enter. Fund v. PCAOB, 561 U.S. 477, 518–19 (2010) (Breyer, J., dissenting) (noting that "no text, no history, perhaps no precedent provides any clear answer" to removal power questions).

[127] The Court has located the President's removal power in Article II's Vesting and Take Care Clauses. See, e.g., *PCAOB*, 561 U.S. at 484.

[128] See id. at 493 ("As we explained in *Myers*, the President therefore must have some 'power of removing those for whom he can not continue to be responsible.'" (quoting *Myers*, 272 U.S. at 117)).

[129] 272 U.S. 52. The Court had decided in 1886 that Congress could limit the President's power to remove inferior officers who are appointed without Senate confirmation. See United States v. Perkins, 116 U.S. 483, 485 (1886).

[130] *Myers*, 272 U.S. at 106–07.

[131] Id. at 176.

[132] Id. at 134–35 (holding that the President has "unrestricted power . . . to remove his appointees"); see also Kagan, supra note 74, at 2322 ("*Myers v. United States* appeared to recognize a plenary power on the part of the President to remove administrative officeholders . . . .").

[133] 295 U.S. 602 (1935).

[134] Id. at 618–19.

ed that the Commissioner was removable only for "inefficiency, neglect of duty, or malfeasance in office."[135] *Myers*'s sweeping holding appeared to invalidate this removal restriction.[136] Nevertheless, the Court sustained the restriction and announced a new rule: Congress can restrict the removal of officials who perform "quasi-judicial" or "quasi-legislative" functions, but not officials who perform "purely executive" functions.[137]

In practice, this amorphous standard amounted to a rule of categorical deference. In the fifty years *Humphrey's Executor* remained good law, the Court did not strike down a single removal restriction under the "functions" distinction.[138] Moreover, the *Humphrey's Executor* rule authorized a whole new class of independent agencies insulated from executive control.[139]

The Court issued its next significant removal power decision over fifty years later in *Bowsher v. Synar*.[140] In *Bowsher*, the Court rebuffed Congress's attempt to reserve for itself the power to remove the Comptroller General of the United States.[141] In the process, *Bowsher* established a narrow, categorical rule: Congress cannot itself participate in the removal of executive officials, except by impeachment.[142] *Bowsher* marks the only time that the Court has struck down congressional arrogation of removal power to itself.[143]

Two years after *Bowsher*, the Court decided *Morrison v. Olson*[144] and effectively overruled *Humphrey's Executor*. In *Morrison*, the Court considered a challenge to the Ethics in Government Act, which created an independent counsel—removable "only for good cause" by the Attorney General—to prosecute high-level wrongdoing in the executive branch.[145]

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[135] Id. at 619.

[136] See *Myers*, 272 U.S. at 134–35 (holding that the President has "unrestricted power . . . to remove his appointees").

[137] *Humphrey's Ex'r*, 295 U.S. at 627–29.

[138] See Barnett, supra note 118, at 1358.

[139] Geoffrey P. Miller, Independent Agencies, 1986 Sup. Ct. Rev. 41, 94 ("*Humphrey's Executor* has long been viewed as the fundamental constitutional charter of the independent regulatory commissions.").

[140] 478 U.S. 714 (1986).

[141] Id. at 720, 736.

[142] Id. at 726.

[143] Some scholars, however, interpret *Myers* as another example of the Court invalidating congressional arrogation of removal authority. See, e.g., Barnett, supra note 118, at 1358.

[144] 487 U.S. 654 (1988).

[145] Id. at 660–63.

Under *Humphrey's Executor*, the independent counsel clearly performed an "executive function." And yet, the Court upheld the removal restriction.[146] To do so, the Court sidestepped *Humphrey's Executor*'s "functions" distinction and announced a new rule to govern the removal power: Congress cannot impose restrictions on removal that "impermissibly burden" the President's authority to supervise the executive branch.[147] In a cursory analysis, the Court found that the Ethics in Government Act passed. Following the Court's lead, lower courts have applied *Morrison*'s "impermissible burden" standard as a basically categorical rule of deference.[148]

The Supreme Court did not issue another removal power opinion until 2010, when it decided *Free Enterprise Fund v. PCAOB*.[149] There, the Court considered a challenge to a removal restriction in the Sarbanes-Oxley Act. Passed in the wake of the Enron and WorldCom scandals, the Act created a board to regulate accounting firms and placed this board under the oversight of the Securities and Exchange Commission ("SEC").[150] The Act provided that the SEC Commissioner could only remove board members for good cause, and the Commissioner himself could only be removed for good cause.[151] The Court struck down this stacking of for-cause restrictions, and for only the third time in its history, invalidated a restriction on the President's removal power.[152] *PCAOB* thus established yet another narrow rule: Congress may not insulate individuals who are exercising significant executive functions with stacked for-cause restrictions.

Justice Breyer issued a strongly worded dissent in *PCAOB*, attacking the majority opinion on several levels. In Breyer's view: (1) invalidation of a second for-cause restriction does not, in fact, increase presidential

[146] Id. at 660.

[147] Id. at 692. Notably, the *Morrison* Court rejected the unitary executive model that Justice Scalia endorsed in his dissent. See id. at 690 n.29 (dismissing Justice Scalia's argument as an "extrapolation from general constitutional language which we think is more than the text will bear").

[148] See, e.g., FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) (Silberman, J.) (holding that "there is not much vitality to [removal claims] after *Morrison v. Olson*").

[149] 561 U.S. 477 (2010).

[150] Id. at 484.

[151] Id. at 495.

[152] Id. at 514.

control;[153] (2) removal restrictions are not a particularly potent form of congressional interference;[154] (3) to whatever extent multiple for-cause restrictions do interfere with presidential control, that interference is justified;[155] and (4) the majority's holding imperils a great swath of tenure protections.[156] Justice Breyer advocates that the Court evaluate the practical effect of removal restrictions on a case-by-case basis, giving Congress a wide measure of deference.[157]

B. Doctrinal Puzzle

The Supreme Court's enforcement of the unitary executive theory—or lack thereof—is puzzling for several reasons. First, although a majority of the Court ostensibly endorses a unitary executive theory of presidential power, the Court has generally refused to check rampant congressional interference with presidential administration. Second, when the Court has roused itself to rebuff such congressional incursions, it has done so in a narrow area of modest importance with no special foundation in the constitutional text—restrictions on removal of executive officials. Third, even within the circumscribed area of the removal power, the Court has established limited, categorical restrictions on the President's removal authority, rather than rolling back all restrictions. Each of these puzzles warrants further elaboration.

Despite the Supreme Court's ostensible support for the unitary executive theory, Congress routinely interferes with presidential administration in myriad ways.[158] A large political science literature demonstrates the power of administrative procedure and agency structure to constrain agency—and thus presidential—policy making.[159] Among other things, Congress controls the stringency of the procedures governing agency action, institutes study requirements, and shapes the composition of agen-

[153] Id. at 526 (Breyer, J., dissenting) ("[T]he majority's decision to eliminate only *layer 2* accomplishes virtually nothing.").

[154] Id. at 532–33.

[155] Id. at 532 ("Congress and the President could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal.").

[156] Id. at 536 ("The Court fails to create a bright-line rule because of considerable uncertainty about the scope of its holding . . . .").

[157] Id. at 523 ("[W]e should decide the constitutional question in light of the provision's practical functioning in context.").

[158] See supra Section III.A.

[159] See supra note 122.

cy decision makers to reflect the interests of favored constituencies.[160] In these ways, Congress controls the information available to agency decision makers and gives itself time to act to prevent agency deviations from congressional preferences. Yet the Court has shown no interest in reviewing or limiting these forms of congressional interference—or any others. Of all the myriad ways in which Congress limits the President's control over the bureaucracy, only removal restrictions have received any constitutional scrutiny at all.

The Court's fixation on this single mechanism of congressional interference is puzzling. The removal power has no special textual significance. That is not to say that the removal power has no plausible constitutional foundation.[161] But the removal power has no greater constituconstitutional foundation than a more general freedom to execute the laws free from congressional interference.[162] The Court, however, has refused to scrutinize Congress's other levers of influence over presidential administration. Moreover, from a structural standpoint, other forms of congressional interference pose at least as great—if not a greater—threat to unitary presidential control than do removal restrictions.[163] Thus, if constitutional text, structure, or ideological commitment to the unitary executive theory were motivating the Court, we should expect the Court to be at least as active in policing other forms of congressional interference. The fact that it is not begs explanation.

The point holds even if the Justices' motivations are more crudely political. Like removal restrictions, other forms of congressional interference with presidential control make the delegation of power to administrative agencies more palatable to Congress. The more influence Congress exerts over the bureaucracy, the lower its risk of unintended policy outcomes from delegating regulatory authority to it.[164] To this ex-

[160] See McNollgast, supra note 112, at 444.

[161] See Calabresi & Rhodes, supra note 108, at 1165–66.

[162] See Lawson, supra note 15, at 1244–45 ("A presidential removal power, even an unlimited removal power, is thus either constitutionally superfluous or constitutionally inadequate. Congress, the President, and the courts have accordingly been spending a great deal of energy arguing about something of relatively little constitutional significance.").

[163] See *PCAOB*, 561 U.S. at 532–33 (Breyer, J., dissenting); see also Richard J. Pierce, Jr., Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of *The Unitary Executive* by Steven G. Calabresi and Christopher S. Yoo, 12 U. Pa. J. Const. L. 593, 603 (2010).

[164] See, e.g., John D. Huber & Charles R. Shipan, Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy 16 (2002) ("[T]he need for legislative details declines"—i.e., the breadth of delegated authority increases—"as institutionalized legislative

tent, these alternate forms of congressional interference facilitate expansion of the administrative state, and with it, federal administrative power. Conservative Justices, therefore, have the same ideological motives to oppose such interference as they do to oppose removal restrictions. Liberal Justices have the opposite motives, though as with removal, they have opportunistic reasons to restrain congressional interference during Democratic administrations, especially when Republicans control one or both houses of Congress. That none of the Justices have acted on these motives outside the context of removal is a genuine puzzle.

So, too, is the manner in which the Court has policed removal restrictions. To bolster unitary executive control, the Court could simply have restored *Myers*'s categorical prohibition on all removal restrictions.[165] Indeed, in the lead up to *PCAOB*, some scholars called on the Court to do just that.[166] More modestly, the Court could have put real teeth into *Morrison*'s prohibition on impermissible interference with the President's supervisory authority. But the Court has not taken this route either. Instead, it has adopted narrow rules that prohibit specific and easily identifiable types of removal restrictions. Specifically, it has barred Congress from arrogating removal authority to itself or employing multi-level for-cause restrictions like the one invalidated in *PCAOB*.[167] As it stands, these are the only meaningful restrictions on Congress's power to restrict the President's removal authority. If the Court's aim is unitary presidential control, why nibble around the edges with such modest rules?

C. Judicial Capacity Model Applied

The answer lies not in the basic logic of the unitary executive theory, but in the limits of judicial capacity. Presidential control of the federal

oversight opportunities improve."); see also Lessig & Sunstein, supra note 118, at 116 ("If Congress may not delegate administrative authority to its own agents, it is likely to be clearer in delegating policymaking authority in the first instance."); Peter M. Shane, Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State, 33 Harv. J.L. & Pub. Pol'y 103, 104–05 (2010) ("If the policymaking discretion of the executive were seriously reduced, Congress might care less about the allocation of intrabranch decision making authority.").

[165] See *Myers*, 272 U.S. at 134–35.

[166] See, e.g., Calabresi & Yoo, supra note 16, at 119 ("*Free Enterprise Fund v. PCAOB* gives the Supreme Court a chance to rectify its previously mistaken removal doctrine by overruling *Morrison v. Olson* . . . .").

[167] See *PCAOB*, 561 U.S. at 514; *Morrison*, 487 U.S. at 686; *Bowsher*, 478 U.S. at 726.

bureaucracy, like the nondelegation doctrine, is both a high-stakes and a high-volume domain. The executive branch is gargantuan. It contains hundreds of agencies and commissions,[168] and over 2.13 million full-time civilian employees.[169] As explained above, Congress influences these agencies and agency officials in multifarious ways.[170] Rigorous enforcement of the unitary executive theory would imperil the existence of independent agencies[171] and would call into question every mechanism of congressional oversight, formal and informal, including the Administrative Procedure Act itself.[172] The ensuing volume of litigation would be enormous. Moreover, any time a lower court invalidates an instance of congressional influence, it always invalidates a federal law—or at least the official act of a federal entity—meaning that the Court feels strongly compelled to grant review. For these reasons, judicial capacity is likely to sharply constrain the Court's decision making in this area. Specifically, judicial capacity will create strong pressure on the Court to adopt hard-edged rules, defer to the political process, or both.

That, in fact, is precisely what we see when we examine the Court's historical treatment of presidential control of the federal bureaucracy. The Court has refused to meaningfully limit congressional encroachment on unitary presidential administration. In fact, the Court has only struck down one type of encroachment—restrictions on the removal of executive officials.[173] Even within this narrow area, the Court has only three times struck down removal restrictions.[174] Apart from those decisions, the Court has simply deferred to the political process. The Court's refusal to act aggressively in this high-stakes and high-volume domain is entirely consistent with the judicial capacity model.

[168] See Office of the Fed. Register, Nat'l Archives & Records Admin., supra note 6, at viii-ix., http://www.gpo.gov/fdsys/pkg/GOVMAN-2013-11-06/pdf/GOVMAN-2013-11-06.pdf [https://perma.cc/GV9Y-56DZ].

[169] Office of Mgmt. & Budget, supra note 3, at 362 tbl.17.1.

[170] See supra Section III.A.

[171] For an argument on why independent agencies are incompatible with the unitary executive theory, see *In re Aiken County*, 645 F.3d 428, 439–42 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

[172] See Calabresi & Yoo, supra note 15, at 3–4 (arguing that the President has complete authority to "*direct* all lower-level executive officials" (emphasis added)).

[173] See Lawson, supra note 15, at 1244 ("Instead, debate has focused almost exclusively on whether and when the President must have unlimited power to *remove* subordinate executive officials.").

[174] See Barnett, supra note 118, at 1358.

Judicial capacity also explains why the Court has focused on the President's removal power and why the Court has invalidated restrictions on that power using narrow categorical rules. Unlike most mechanisms of congressional influence, the removal power is discrete—it can be cleanly distinguished from Congress's other powers. As a result, the removal power is relatively susceptible to hard-edged categorical rules that insulate the vast majority of government action from constitutional challenge. The Court's categorical rule against congressional arrogation of removal authority is a prime example.[175] From the standpoint of judicial capacity, this rule has two advantages. First, it appears to threaten only a tiny number of federal laws.[176] Second, it is crafted in clear and categorical terms, which reduces uncertainty for potential litigants and thus reduces the volume of litigation. Unlike constitutional text or judicial ideology, the amenability of the removal power to such rules explains why the Court has treated it so differently from other forms of congressional interference.[177]

Notably, when the Court has employed mushier standards to protect the President's removal power, those standards have generally collapsed into highly deferential rational-basis review or have been abandoned altogether. For example, *Morrison*'s prohibition on removal restrictions that impermissibly burden the President's supervisory authority has been interpreted by the lower courts as something resembling a rational-basis test.[178] Similarly, *Morrison* discarded *Humphrey's Executor*'s hazy distinction between "quasi-judicial," "quasi-legislative," and "purely executive" functions,[179] which in its entire fifty-year history had never

[175] *Bowsher*, 478 U.S. at 726.

[176] See Barnett, supra note 118, at 1359 (discussing the limited application of *Bowsher*'s rule against congressional arrogation of removal authority).

[177] Coan, Judicial Capacity, supra note 18, at 433 n.27 ("Categorical rules reduce disuniformity among lower courts by reducing mistakes and making deviation easier to police. They encourage settlement by reducing uncertainty and more closely aligning adverse parties' assessments of the risk-adjusted value of litigation." (citations omitted)).

[178] See, e.g., FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) (Silberman, J.) (holding that "there is not much vitality to [removal claims] after *Morrison v. Olson*"). Notably, Judge Silberman wrote the D.C. Circuit decision striking down the independent counsel statute, in part on removal power grounds, that was reversed in *Morrison*. See In re Sealed Case, 838 F.2d 476, 511 (D.C. Cir. 1988) (Silberman, J.), rev'd sub nom. *Morrison*, 487 U.S. 654. He is no friend to restrictions on presidential power over the administrative state.

[179] *Morrison*, 487 U.S. at 689–90.

been applied to invalidate a congressional statute.[180] This is consistent with what the judicial capacity model predicts in this high-stakes and high-volume domain, where vague standards invite an unacceptable volume of litigation unless they are effectively toothless.

For similar reasons, the constraints of judicial capacity help to explain the Supreme Court's reluctance to adopt Justice Breyer's approach to the removal power. In *PCAOB*, Justice Breyer advocated evaluating removal restrictions on a case-by-case basis by looking to the practical effect of the restriction.[181] As Breyer himself noted, a hodgepodge of different rules restrict the removal of thousands of executive branch officials.[182] If applied with any real stringency, Breyer's nebulous test would call into question all of these restrictions, generating a large volume of litigation, much of which the Court would feel compelled to grant review.

On the other hand, there is reason to doubt Breyer's test was ever meant to be applied stringently. His lengthy paean to Congress's superior institutional competence and the consequent need for judicial deference is strongly reminiscent of rational-basis review.[183] If Breyer's approach is ever adopted—and it fell only one vote short in *PCAOB*—the judicial capacity model predicts that it will amount to a rule of near categorical deference, much like *Morrison* and *Humphrey's Executor* before it.

Judicial capacity also explains why the Court has not restored *Myers*'s categorical prohibition on all removal restrictions. From the standpoint of judicial capacity, such a rule has the benefit of clarity—it is hard-edged and categorical. But this rule is so stringent that its application would generate an enormous volume of litigation. To categorically prohibit removal restrictions, the Court would have to dismantle independent agencies such as the Federal Reserve.[184] It would also have to closely scrutinize restrictions on the removal of tens of thousands of lower-level federal employees, among them administrative law judges, immigration judges, and many other officials charged with performing classically ad-

[180] See Barnett, supra 118, at 1358.

[181] *PCAOB*, 561 U.S. at 523 (Breyer, J., dissenting) ("[W]e should decide the constitutional question in light of the provision's practical functioning in context.").

[182] Id. at 540–41.

[183] Id. at 523 ("Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration, and the manner in which power, including and most especially political power, operates in context.").

[184] See Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1392 (7th Cir. 1986) (Posner, J.).

judicative functions.[185] The resulting deluge of litigation would overwhelm the Court's modest capacity. The constraints of judicial capacity therefore make it difficult to imagine the Court reintroducing *Myers*'s prohibition on removal restrictions, however tempted the Court may be to do so.[186]

Even if the categorical nature of the *Myers* rule could keep litigation within manageable bounds, it would produce results many Justices would find unpalatable. Among other things, that rule would require the Court to strip the Federal Reserve, the civil service, and the whole corps of administrative law and immigration judges of removal protection. There is good reason to think that such extreme results would give pause to many Justices.[187] In the high-volume and high-stakes domain of presidential administration, however, the Court cannot adopt mushy standards without inviting an unsustainable volume of litigation. Thus, the Court is forced to choose between the unpalatable results of a *Myers*-like prohibition and the large-scale sacrifice of the unitary executive entailed by the Court's current, nibble-around-the-edges approach. Given this choice, it is not surprising that the Court has selected the latter course.[188]

To be sure, other explanations are available for the Court's failure to meaningfully enforce the unitary executive theory. Perhaps the Court is restrained by a self-protective reluctance to challenge Congress. Or perhaps the Court is skeptical of its own competence to police congressional interference with presidential administration. There are, however, two problems with these accounts. First, they do not exclude an important explanatory role for judicial capacity. As we discussed above, the limits of judicial capacity are an important reason why the Court might be hesitant to take on Congress and circumspect about its own competence.[189] Second, as we will see in the next Part, the Court has not been

[185] Formally, *Myers* did not extend to restrictions on the removal of inferior officers, but its logic and the logic of the unitary executive theory surely does. See Yoo, supra note 113, at 1947 ("Because the Constitution makes the president ultimately responsible for executing the laws, he must also have the ability to control inferior executive officers to prevent them from enforcing or interpreting federal law at odds with his views.").

[186] *Myers* itself was decided before the rise of the modern administrative state and before the law of standing evolved to permit regulated parties to challenge removal restrictions. Under modern conditions, it is hard to imagine the *Myers* rule lasting as long as it did.

[187] See *Hosp. Corp. of Am.*, 807 F.2d at 1392 (Posner, J.) (noting that elimination of for-cause removal restrictions would represent a "seismic constitutional change").

[188] This is a good illustration of the way in which the judicial capacity model interacts with the Justices' substantive preferences. For more on this, see infra Part VII.

[189] See supra Section II.C.

shy about challenging congressional interference with presidential administration when it can do so in the form of hard-edged categorical rules. This suggests that neither timidity nor modesty tells the whole story.

IV. A TALE OF TWO VETOES

The Supreme Court has occasionally thrown off the mantle of deference and aggressively asserted itself in executive power decisions. The Court's blanket prohibitions on legislative and line-item vetoes are two examples.[190] These decisions are, at first glance, difficult to reconcile with the Court's historically complacent approach to the nondelegation doctrine and general refusal to check congressional interference with unitary presidential administration.

This Part applies the judicial capacity model to help explain the Court's willingness to act aggressively in these domains. Unlike the areas in which the Court has adopted a strongly deferential approach, the legislative and line-item vetoes are amenable to relatively hard-edged categorical rules. Such categorical rules clearly insulate much legislation—anything that does meet the clear definition of a legislative or line-item veto—from constitutional challenge. They also reduce uncertainty and thus reduce the volume of litigation. When the result is a foregone conclusion, there is far less reason to litigate.

A. Legislative and Line-Item Vetoes

1. The Legislative Veto and INS v. Chadha

For over fifty years, Congress used the "legislative veto" to control federal agencies.[191] The legislative veto was a simple device. At the same time Congress delegated power to an administrative agency, it would reserve the authority to "veto" the agency's exercise of that power.[192] Some legislative vetoes required the veto to pass both Houses of

[190] See Clinton v. City of New York, 524 U.S. 417, 448 (1998) (prohibiting line-item vetoes); INS v. Chadha, 462 U.S. 919, 959 (1983) (prohibiting legislative vetoes).

[191] See Stephen Breyer, The Legislative Veto After *Chadha*, Lecture at the Georgetown University Law Center (Oct. 13, 1983), *in* 72 Geo. L.J. 785, 786 (1984); Edward H. Stiglitz, Unitary Innovations and Political Accountability, 99 Cornell L. Rev. 1133, 1146–47 (2014).

[192] Breyer, supra note 191, at 785–86.

Congress, while others merely required passage by one House or even a single committee.[193]

Congress enacted the first legislative veto in 1932, in legislation that granted President Hoover the authority to reorganize the executive branch.[194] Over time, Congress used the legislative veto with increasing frequency[195] and came to rely heavily on the veto as a convenient tool for oversight.[196] By the mid-1980s, the legislative veto had found its way into nearly 200 federal statutes[197] and appeared in a wide range of federal regulation, from the space program to adjustment of federal pay rates.[198] During this fifty-year span, the Supreme Court declined to assess the constitutionality of the legislative veto.[199]

In *INS v. Chadha*,[200] however, the Supreme Court dealt a death blow to the legislative veto in one fell swoop. *Chadha* involved a challenge to a veto provision in the Immigration and Naturalization Act.[201] Under the Act, either House of Congress could veto decisions by the Attorney General to suspend deportations.[202] Chief Justice Burger, writing for the majority, penned a rigid and formalistic opinion striking down the legislative veto. Burger began from the premise that the legislative veto was "legislative in its character and effect."[203] But the Constitution only per-

[193] See Louis Fisher, The Legislative Veto: Invalidated, It Survives, 56 L. & Contemp. Probs. 273, 273 (1993).

[194] Breyer, supra note 191, at 786.

[195] Id. at 786 ("Since 1932, veto clauses have proliferated like water-lilies on a pond (or algae in a swimming pool, depending on one's point of view).").

[196] INS v. Chadha, 462 U.S. 919, 967–68 (1983) (White, J., dissenting) (arguing that the legislative veto "has become a central means by which Congress secures the accountability of executive and independent agencies"); see also James Abourezk, The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives, 52 Ind. L.J. 323, 324 (1977) (finding that Congress included a legislative veto-type procedure 295 times in 196 distinct statutes from 1932–1975 with increasing frequency by decade).

[197] *Chadha*, 462 U.S. at 968 (White, J., dissenting).

[198] Id. at 969–70.

[199] See E. Donald Elliott, *INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto, 1983 Sup. Ct. Rev. 125, 129 & n.25 (citing cases challenging legislative vetoes where the Court declined to assess their constitutionality); see, e.g., Buckley v. Valeo, 424 U.S. 1, 140 n.176 (1976).

[200] 462 U.S. 919.

[201] Act of Oct. 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247, 1248 (codified at 8 U.S.C. § 1254(c)(2) (1963)) (repealed 1986).

[202] *Chadha*, 462 U.S. at 934.

[203] Id. at 952.

mits Congress to legislate in one way—according to Article I principles of bicameral passage[204] and presidential presentment.[205]

All legislative vetoes violated the latter principle because they were not presented to the President. Many legislative vetoes also violated bicameralism because only one House could veto the proposed action. The legislative veto in *Chadha* failed both requirements and was thus unconstitutional.[206] Notably, however, the Court determined that the veto provision was severable from the Act and thus greatly reduced the impact of its holding.[207]

Justice Powell, in concurrence, and Justice White, in dissent, both expressed concern over the scope of the Court's holding.[208] Both Justices advocated for a narrower approach. Justice Powell judged the *Chadha* veto to be an unconstitutional exercise of judicial power by Congress, but did not extend his reasoning to all legislative vetoes.[209] Justice White, on the other hand, thought that the Court should defer because the legislative veto was an "important if not indispensable political invention."[210]

2. The Line-Item Veto and Clinton v. City of New York

In 1996, Congress enacted the Line Item Veto Act, which empowered the President to "cancel" certain items in appropriations bills.[211] Specifically, the Act permitted the President to cancel: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."[212] The effect of a cancellation was to pre-

[204] See U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives." (emphasis added)).

[205] See id. § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, *be presented to the President* of the United States . . . ." (emphasis added)); id. cl. 3 ("*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . *shall be presented* to the President of the United States; and before the Same shall take Effect, *shall be* approved by him, or being disapproved by him, *shall be* repassed by two thirds of the Senate and House of Representatives . . . ." (emphasis added)).

[206] 462 U.S. at 959.

[207] Id. at 931–32.

[208] Id. at 959 (Powell, J., concurring) ("The breadth of this holding gives one pause."); id. at 967 (White, J., dissenting).

[209] Id. at 960 (Powell, J., concurring).

[210] Id. at 972 (White, J., dissenting).

[211] See Line Item Veto Act of 1996, 2 U.S.C. §§ 691–692 (Supp. 2000).

[212] Id. § 691(a).

vent the particular provision "from having legal force or effect."[213] The Act required the President to make certain findings to justify a cancellation[214] and to notify Congress of any cancellation within a set time.[215] If the President exercised his cancellation authority, Congress retained the power to then pass a "disapproval bill," nullifying the President's action.[216] The constitutionality of the Act was immediately challenged.[217]

In *Clinton v. City of New York*,[218] the Supreme Court struck down the Line Item Veto Act because it violated the "finely wrought" procedures of Article I.[219] In the Court's view, the cancellation of a line item in an enacted law was tantamount to amending and repealing statutory text.[220] The Presentment Clause, however, required that all legislation be passed by both Houses of Congress and then presented to the President.[221] By authorizing the President to unilaterally repeal parts of enacted statutes, the Act circumvented the constitutionally prescribed procedure for repealing statutes.

The two dissenting opinions in *Clinton* convincingly dismantled the majority's Presentment Clause argument[222] and cut to the heart of the case—congressional delegation.[223] On the dissenters' view, the Line Item Veto Act was clearly constitutional under a delegation analysis.[224] The majority seemed to implicitly acknowledge the dissenters' point by

[213] Id. §§ 691(a), 691e(4).

[214] Specifically, the President was required to determine that the cancellation would reduce the federal budget deficit, not impair any essential government functions, and not harm the national interest. Id. § 691(a)(3)(A).

[215] Id. § 691(a)(3)(B).

[216] Id. §§ 691b(a), 691d, 691e(6).

[217] The Act was challenged before it even took effect. See Nat'l Treasury Emp. Union v. United States, 929 F. Supp. 484, 484 (D.D.C. 1996). When that challenge was dismissed on jurisdictional grounds, id. at 490, several members of Congress challenged the Act the day that it went into effect. See Byrd v. Raines, 956 F. Supp. 25, 27 (D.D.C. 1997).

[218] 524 U.S. 417 (1998).

[219] Id. at 447 (quoting *Chadha*, 462 U.S. at 951).

[220] Id. at 438.

[221] U.S. Const. art. I, § 7; see *Clinton*, 524 U.S. at 438.

[222] *Clinton*, 524 U.S. at 463–66 (Scalia, J., dissenting in relevant part); id. at 473–80 (Breyer, J., dissenting).

[223] Id. at 465 (Scalia, J., dissenting in relevant part) ("I turn, then, to the crux of the matter: whether Congress's authorizing the President to cancel an item of spending gives him a power that our history and traditions show must reside exclusively in the Legislative Branch."); id. at 482 (Breyer, J., dissenting).

[224] Id. at 465 (Scalia, J., dissenting in relevant part); id. at 480 (Breyer, J., dissenting).

discussing at length nondelegation principles and cases.[225] Indeed, after peeling back its Presentment Clause analysis, the majority opinion seems chiefly animated by a concern with the breadth and novelty of the congressional delegation.[226]

B. Doctrinal Puzzle

Chadha and *Clinton* are interesting examples of the Supreme Court breaking from its usually deferential posture in executive power decisions. What is puzzling about the *Chadha* decision is that it appears animated by concern for unitary executive control—a concern the Court has generally refused to act on.[227] Although cast as a decision about the procedural requirements for congressional action under Article I, *Chadha*'s most important effect was to eliminate a widely used tool of congressional oversight.[228] The legislative veto undermined unitary presidential control of the bureaucracy by allowing Congress to countermand agency decisions without involving the President.[229] The Court rebuffed this incursion into unitary executive control, and in so doing, invalidated more than two hundred federal statutes.[230] As Justice White noted in dissent, *Chadha* single-handedly invalidated more federal laws than the Court had in its entire history.[231] *Chadha*'s aggressive invalidation of federal law seems difficult to reconcile with the Court's broadly deferential stance toward congressional influence with unitary executive control. Why was the *Chadha* Court willing to eschew its normally deferential posture and strike down hundreds of federal laws?

[225] See id. at 442–47 (majority opinion) (discussing how much "discretion" the Act delegates to the President and discussing the application of *Field v. Clark*, 143 U.S. 649 (1892)).

[226] See id. at 446–47 ("The critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act's predecessors could even arguably have been construed to authorize such a change.").

[227] See supra Section II.A.

[228] See *Chadha*, 462 U.S. at 967–69 (White, J., dissenting) ("The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated.").

[229] See Stiglitz, supra note 191, at 1147 ("[T]he legislative veto directly undermined the central tenet of the unitary executive: under the device, according to critics, control over the administration of statutes was plainly plural rather than unitary.").

[230] *Chadha*, 462 U.S. at 1002 (White, J., dissenting).

[231] Id. ("Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history.").

Similarly, the *Clinton* decision appears to be animated by nondelegation principles,[232] which the Court has been unwilling to give effect elsewhere.[233] Like *Chadha*, *Clinton* was cast as a formal decision about the Presentment Clause.[234] However, for all of its discussion of Article I, Section Seven, the majority seemed most acutely concerned with congressional delegation. By authorizing the President to cancel individual appropriations on his own authority, the Line Item Veto Act effectively delegated legislative power to the President. Galled by the novelty of this delegation, the Court struck down the Line Item Veto Act.[235] *Clinton*'s aggressive validation of nondelegation principles flies in the face of the Court's usual deference to congressional delegation. But *Clinton* was also an odd place for the Court to invoke the nondelegation doctrine. As the *Clinton* dissenters pointed out, many delegations of power convey at least as much policy-making authority as the line-item veto.[236] Why did the Court break from its historically deferential posture toward the nondelegation doctrine to invalidate the line-item veto?

C. Judicial Capacity Model Applied

At first glance, *Chadha* and *Clinton* are difficult to reconcile with the Supreme Court's historically deferential posture to congressional delegations and interference with presidential administration. Judicial capacity, however, provides an illuminating explanation.

For reasons already discussed, the nondelegation doctrine and presidential control of the bureaucracy are both high-volume and high-stakes domains.[237] By acting aggressively in either of these areas, the Court would call into question an enormous amount of legislation and thereby

[232] See Kagan, supra note 74, at 2366 (noting that the "real question" in *Clinton* "was whether the power granted to the President constituted an impermissible delegation").

[233] See supra Section II.A; see also Michael B. Rappaport, The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for *Clinton v. City of New York*, 76 Tul. L. Rev. 265, 293 (2001) ("[T]here is simply no basis for subjecting delegations of cancellation authority to a stricter standard than delegations of rulemaking authority.").

[234] See *Clinton*, 524 U.S. at 448 (claiming that "the delegation issue . . . does not really bear on the narrow issue that is dispositive of these cases").

[235] See id. at 446–47.

[236] See id. at 485 (Breyer, J., dissenting) ("[T]his Court has upheld standards that are equally broad, or broader."); see also Rappaport, supra note 233, at 294 (arguing that "cancellation authority generally provides less policymaking discretion to the executive than rulemaking and other forms of authority").

[237] See supra Part III.

invite a deluge of litigation. All of that litigation would implicate federal laws, and thus the Court would feel compelled to grant review over lower court decisions to ensure uniformity. Considerations of judicial capacity have therefore constrained the Court to adopt hard-edged rules, defer to the political process, or both. As we have seen, however, the Court has generally been unable to fashion clear and functionally defensible categorical rules to govern congressional delegation or presidential control of the bureaucracy. It has therefore felt compelled to defer to the political process. *Chadha* and *Clinton*, by contrast, provided the Court rare opportunities to act aggressively in these domains without generating a great deal of litigation.

Unlike other presidential administration cases, *Chadha* was able to strike down a mechanism of congressional interference in convincingly rule-like fashion: Legislative vetoes are unconstitutional.[238] To be sure, *Chadha* overruled a great deal of legislation. But it did so in clear and categorical terms. This has two important benefits from the perspective of judicial capacity. First, *Chadha*'s rule clearly and categorically insulated the great majority of congressional interferences with presidential administration from constitutional challenge. Second, the clarity of *Chadha*'s rule reduces uncertainty among potential litigants and thus the volume of litigation. Once the Court made clear that it was sticking with *Chadha*'s invalidation of *all* legislative vetoes,[239] it invited little litigation. Litigants are less likely to bring suit when the result is a foregone conclusion. The Court further cabined the impact of *Chadha* with its severability holding.[240] In sum, the key to understanding *Chadha* is the simple fact that it offered the Court a rare opportunity to vindicate unitary executive principles without overwhelming its limited capacity. The Court seized it.

The judicial capacity model provides a similar explanation for the Court's aggressive action in *Clinton*. Unlike other delegation cases, *Clinton* was able to strike down a congressional delegation in terms of a hard-edged categorical rule: Congress cannot delegate to the President

[238] *Chadha*, 462 U.S. at 959.

[239] Days after deciding *Chadha*, the Supreme Court summarily affirmed two cases that struck down legislative vetoes. See Process Gas Consumers Grp. of Am. v. Consumer Energy Council of Am., 463 U.S. 1216 (1983), aff'g Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982); U.S. Senate v. FTC, 463 U.S. 1216 (1983), aff'g Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

[240] 462 U.S. at 935 (severing the legislative veto from the Act).

the power to amend duly enacted statutes.[241] *Clinton*'s clear and hard-edged rule clearly insulates the vast majority of congressional delegations from constitutional challenge. Moreover, like *Chadha*, the clarity of *Clinton* reduces uncertainty and thus the volume of litigation. *Clinton*, however, was even more narrowly drawn than *Chadha*: It invalidated just one law—the Line Item Veto Act. *Clinton* gave the Court a chance to enforce the nondelegation doctrine without triggering an avalanche of litigation,[242] and the Court jumped at that chance.

Just as the judicial capacity model helps to explain *Chadha* and *Clinton*, these decisions provide important support for the model. No other plausible alternative can explain the Court's willingness to enforce unitary executive and nondelegation principles in these decisions when it has refused to do so otherwise. Judicial ideology, legal principle, fear of political reprisal, and judicial incompetence all predict that the Court should be deferential—or at least consistent—across all four contexts. Even less can any of these theories explain the Court's choice to cast *Chadha* and *Clinton* in the form of hard-edged categorical rules.

The judicial capacity model, by contrast, predicts both of these results. In high-stakes and high-volume domains, capacity limits constrain a Court motivated to enforce constitutional limits to do so in the form of categorical rules that cleanly insulate most government action from constitutional challenge. As such, the Court will be able to act only where the imposition of such rules will be substantively palatable. This describes *Chadha* and *Clinton* to a T.

V. FOREIGN AFFAIRS AND NATIONAL SECURITY

The pattern of Supreme Court decisions in foreign affairs and national security cases is interestingly different from other areas of executive power. As in those areas, the Court's general approach in this domain is broadly deferential.[243] But when the Court has departed from this defer-

[241] *Clinton*, 524 U.S. at 446–47 ("The critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes.").

[242] See Rappaport, supra note 233, at 301 ("For the Justices in the [*Clinton*] majority, who were clearly disturbed by the broad delegation, the question was how to strike down the Act without casting doubt on other delegations.").

[243] There is a vast literature cataloging judicial deference to executive power in the foreign affairs and national security domain. For a sampling, see Louis Henkin, Foreign Affairs and the United States Constitution 132 (2d ed. 1996) ("[F]oreign affairs make a difference. Here, the courts are less willing than elsewhere to curb the federal political branches, are even

ential stance, it has done so in an unusual way. The Court has tended to adopt vague standards, rather than hard-edged rules. This Part applies the judicial capacity model to explain this unusual pattern of decisions. In short, our argument is that, in this area of executive power, the volume of potential litigation is uniquely low. As a result, the Court need not fear inviting too much litigation and can therefore adopt vague and nondeferential standards, which it would otherwise shy away from.

A. Concise Summary of the Case Law

In the domain of foreign affairs and national security, the Supreme Court has frequently adopted vague standards to invalidate presidential action. The most notable example is Justice Jackson's malleable three-part framework for evaluating presidential power, first articulated in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[244] *Youngstown* involved a challenge to President Truman's decision to seize the nation's steel mills during the Korean War in order to keep them operating in the face of a labor strike.[245] Prior to this seizure, Congress had enacted the Taft-Hartley Act and had rejected an amendment that would have authorized the President to seize production facilities.[246] Based on this record, the Court struck down Truman's seizure by a 6-3 margin, issuing seven opinions to explain the Justices' varied reasoning—Justice Black's majority opinion, five concurrences, and Chief Justice Vinson's

more disposed to presume the constitutional validity of their actions and to accept their interpretations of statutes, and have even developed doctrines of special deference to them."); Curtis A. Bradley, *Chevron* Deference and Foreign Affairs, 86 Va. L. Rev. 649, 659 (2000) ("Since early in the nation's history, courts have been reluctant to contradict the executive branch in its conduct of foreign relations."); Christina E. Wells, Questioning Deference, 69 Mo. L. Rev. 903, 903 (2004) ("But when the nation is at war or faces some similar crisis, the Court (and lower courts applying its jurisprudence) tends to review potential infringements of civil liberties with extreme deference.").

[244] See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring); see also Adrian Vermeule, Our Schmittian Administrative Law, 122 Harv. L. Rev. 1095, 1141–42 (2009) ("In a world of multiple and very vague statutory delegations bearing on national security, foreign relations, and emergency powers, judges have a great deal of freedom—not infinite freedom, of course—to assign *Youngstown* categories to support the decisions they want to reach, rather than reach decisions based on the *Youngstown* categories.").

[245] *Youngstown*, 343 U.S. at 582–83.

[246] Id. at 599–600 (Frankfurter, J., concurring) ("Authorization for seizure as an available remedy for potential dangers was unequivocally put aside.").

dissent.[247] Over time, Justice Jackson's concurrence has proven to be the most influential *Youngstown* opinion.[248]

Justice Jackson based his analysis on the premise that executive power is elastic and its strength depends on congressional action and inaction.[249] Justice Jackson then famously divided presidential power into three categories. First, when the President acts with the express or implied authorization of Congress, his power is "at its maximum."[250] Second, when the President acts without Congress's approval or disapproval, his power is in a "zone of twilight."[251] Third, when the President acts contrary to the "expressed or implied" will of Congress, his power is "at its lowest ebb."[252]

Justice Jackson's application of his framework in *Youngstown* exemplifies the malleability of the three categories. Justice Jackson determined that the steel-mill seizure fell into the third category because, on his reading, the President had acted contrary to the Taft-Hartley Act—Congress declined to adopt an amendment that would have authorized the President's seizure.[253] At least plausibly, however, the seizure may have fallen into one of the other two categories. The Taft-Hartley Act did not expressly prohibit the steel-mill seizure,[254] so Justice Jackson could have determined that Congress was silent on the issue—placing the seizure in the "zone of twilight." Alternatively, Justice Jackson could have reasoned that Congress impliedly approved the President's action by failing to take action after the seizure.[255] The point is not that Justice

[247] See id. at 580.

[248] See Medellin v. Texas, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."); Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) ("[W]e have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful . . . ."); see also Edward T. Swaine, The Political Economy of *Youngstown*, 83 S. Cal. L. Rev. 263, 266 (2010) (asserting that Justice Jackson's concurrence "has become *Youngstown*'s enduring legacy" and "is one of the Court's all-time greats").

[249] See *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

[250] Id. at 635.

[251] Id. at 637.

[252] Id. at 637–38.

[253] Id. at 639.

[254] See id. at 702–03 (Vinson, C.J., dissenting) (arguing that Congress's authorization of seizures in certain contexts did not evidence an intent to bar seizures in all other situations).

[255] See id. at 677 (noting the lack of congressional action in response to the seizure).

Jackson should have placed the seizure in one of the other categories, but rather that he could have justifiably done so.

The Supreme Court's first use of Justice Jackson's framework in *Dames & Moore v. Regan*[256] further demonstrated the malleability of his three categories.[257] Evaluating the President's power to suspend claims pending in United States courts against the Republic of Iran, the Court determined that the President lacked specific statutory authorization.[258] Nevertheless, the Court reasoned that Congress had impliedly authorized the suspension in light of the "general tenor" of legislation[259] and historic acquiescence to the President's claim-settlement authority.[260] Consequently, the Court placed the suspension of claims in Justice Jackson's first category.[261] In other words, faced with similar records of congressional inaction, Justice Jackson and the *Dames & Moore* Court reached opposite conclusions. The former inferred congressional disapproval, while the latter inferred congressional approval.[262]

The Court once again molded Justice Jackson's framework in *Medellin v. Texas*.[263] In *Medellin*, the Court considered whether the President could preempt state procedural rules and command state courts to give effect to a decision of the International Court of Justice.[264] The President

[256] 453 U.S. 654 (1981).

[257] See Harold Hongju Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 Yale L.J. 1255, 1310–11 (1988) ("*Dames & Moore* dramatically alters the application of *Youngstown*'s constitutional analysis in foreign affairs cases.").

[258] *Dames & Moore*, 453 U.S. at 675.

[259] Specifically, the Court read the International Emergency Economic Powers Act and the Hostage Act as delegating broad authority to the President in times of national emergencies, which indirectly supported a "broad scope for executive action." Id. at 677–79.

[260] The Court reached this conclusion despite the fact that the President had never before suspended pending lawsuits. See William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083, 1165 (2008).

[261] *Dames & Moore*, 453 U.S. at 680.

[262] Cf. Alan B. Morrison, The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation, 81 Geo. Wash. L. Rev. 1211, 1218 (2013) ("*Youngstown* used congressional silence or inaction to defeat the President's claim that he was authorized to end the steel strike, and *Dames & Moore* used congressional silence . . . to sustain the President's imposition of mandatory arbitration of claims against Iran . . . .").

[263] 552 U.S. 491 (2008). See Swaine, supra note 248, at 332 ("[T]he conventional problem that when the Court purports to be discovering congressional will, particularly when going beyond statutory text, it is really expressing its own—usurping congressional authority, even in the guise of protecting that authority against the executive branch.").

[264] 552 U.S. at 498–99.

had never before attempted such an action, and Congress had not expressly approved or disapproved this action.[265] In striking down the President's action, the Court refined Justice Jackson's framework yet again. The Court reasoned that, because there was no "longstanding practice" of congressional acquiescence, the President's action fell into category three, i.e., the President acted contrary to the will of Congress.[266] Quite plausibly, however, the Court might have determined that the President's action fell into the "zone of twilight"—Congress was silent on the issue. By insisting on longstanding congressional acquiescence to reach the "zone of twilight" category, *Medellin* effectively erased it from Justice Jackson's three-part framework.

Importantly, Justice Jackson's malleable framework is merely one of many vague standards that the Supreme Court has adopted in the area of foreign affairs and national security. For example, in the context of executive detention, the Court has applied the mushy *Mathews v. Eldridge*[267] balancing test to require some form of hearing for a United States citizen detained as an enemy combatant.[268] Similarly, with respect to suspension of habeas corpus, the Court has ruled that foreign persons designated as enemy combatants are due some form of hearing but has failed to specify the nature of that hearing.[269] In addition, the Court has unevenly applied the political question doctrine to deny review in foreign affairs and national security cases.[270]

[265] Id. at 532 ("[T]he Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts . . . .").

[266] Id. at 494–95, 532.

[267] 424 U.S. 319, 335 (1976).

[268] See Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004).

[269] See Boumediene v. Bush, 553 U.S. 723, 795 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 634 (2006).

[270] See, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1424–25 (2012) (refusing to apply the political question doctrine); Gilligan v. Morgan, 413 U.S. 1, 11–12 (1973) (applying the political question doctrine to preclude review); see also Jide Nzelibe, The Uniqueness of Foreign Affairs, 89 Iowa L. Rev. 941, 943 (2004) ("While the reports of the [political question] doctrine's demise in foreign affairs are greatly exaggerated, its judicial application is replete with so many inconsistencies that its basic contours remain ill-defined and incoherent." (footnote omitted)).

B. Doctrinal Puzzle

It is not especially puzzling that the Court would find standards attractive in foreign affairs and national security cases.[271] Standards preserve flexibility, and the need for flexibility in this domain is strong. It is difficult to anticipate the precise contours of exigencies requiring executive dispatch.[272] The Court's use of standards might also reflect its sensitivity to presidential politics. A flexible standard allows the Court to constrain weak Presidents and defer to stronger Presidents.[273] Finally, to cite just one other possibility, the Court might prefer standards because they allow for more nuance, as compared to categorical rules, which are inevitably both over- and under-inclusive relative to their underlying purpose.[274] The list could go on, but these three reasons to prefer standards suffice to make the essential point. There will often be powerful, if not compelling, justifications for the Court to employ standards in its constitutional decisions invalidating government action.

The attractiveness of standards, of course, transcends foreign affairs and national security law. Indeed, similarly powerful reasons to prefer standards exist in the context of congressional delegation and presidential administration. How much delegation is too much is necessarily a question of degree, more amenable to formulation as a standard than as a categorical rule. The desirability of unitary executive control, on many plausible views, varies by context.[275] If so, it needs to be balanced against the benefits of insulation for some functions, in particular adju-

[271] Cf. Koh, supra note 257, at 1315–16 (arguing that the Court's deference in this area "stems from a complex admixture of judicial attitudes stemming in equal parts from confusion, cowardice, and concerns about judicial competence and the Constitution").

[272] See, e.g., *Youngstown*, 343 U.S. at 629 (Douglas, J., concurring) ("The President with the armed services at his disposal can move with force as well as with speed. . . . Legislative power, by contrast, is slower to exercise."); id. at 700 (Vinson, C.J., dissenting) ("History bears out the genius of the Founding Fathers, who created a Government subject to law but not left subject to inertia when vigor and initiative are required.").

[273] See Robert J. Pushaw, Jr., The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review, 82 Notre Dame L. Rev. 1005, 1046 (2007) ("The degree of deference to the executive ebbs and flows based upon myriad (and often highly subjective) factors, including . . . the political strength of the President and the likelihood he will obey the Court's judgment . . . .").

[274] See Komesar, supra note 39, at 147.

[275] See, e.g., Barnett, supra note 118, at 1352 (suggesting that the Court distinguish between "strong," "intermediate," and "weak" removal restrictions).

dication.[276] Such balancing, too, is more readily accomplished through a standard than a categorical rule.

Nevertheless, the Court has been unwilling to employ standards to invalidate government action in either of these domains. When it has employed standards, they have been extremely deferential and in fact have generally collapsed into rules of categorical deference.[277] By contrast, on the rare occasions when the Court has invalidated government action, its decisions have invariably taken the form of categorical rules.[278] In other words, the puzzle presented by national security and foreign affairs cases is why they are so unpuzzling, while other executive power domains are decidedly the opposite. What is it about this domain that permits the Court to yield to the powerful temptation to employ standards to invalidate government action, while the Court is unable to do so in other executive power cases?

C. Judicial Capacity Model Applied

The judicial capacity model helps to answer this question. Like other domains of executive power, the constitutional law of foreign affairs and national security is a high-stakes domain. Cases implicating the President's power over foreign affairs and national security are all federal cases and often involve issues of great public import. The Court therefore feels strongly compelled to grant review over a large fraction of lower court decisions in this domain, particularly where the government loses. Compounding that pressure is the fact that cases involving national security and foreign affairs are often unusually time-sensitive.[279]

Unlike many other areas of executive power, however, the foreign affairs and national security domain is low-volume. Put simply, the vol-

[276] See, e.g., Rao, supra note 113, at 1247–48 (carving out most adjudicators from the President's removal power). The Federal Reserve and the civil service are two other entities whose insulation many unitary executive proponents are reluctant to question. See, e.g., Yoo, supra note 113, at 1963 ("A president should favor central bank independence, which correlates positively with political freedom, political stability, and price stability.").

[277] See supra notes 178–82 and accompanying text.

[278] *Free Enterprise Fund v. PCAOB*, *Clinton v. City of New York*, and *INS v. Chadha* are examples. See supra Section III.A and Part IV.

[279] See, e.g., *Dames & Moore*, 453 U.S. at 660 ("We granted certiorari before judgment in this case, and set an expedited briefing and argument schedule, because lower courts had reached conflicting conclusions on the validity of the President's actions and, as the Solicitor General informed us, unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement.").

ume of both actual and potential litigation in this area is uniquely low compared to other executive power domains. Foreign affairs and national security cases simply do not arise with the same frequency as delegation and presidential administration cases. The latter two issues are completely ubiquitous in the modern administrative state,[280] and nearly always affect the interests of highly motivated private parties with standing to litigate.[281] Actual and potential litigation over foreign affairs and national security issues is almost vanishingly rare by comparison.[282] War and national security emergencies occur only so often. Moreover, controversies in these areas often do not implicate the interests of many or any private individuals with standing to sue.[283] As a result, judicial capacity operates as much less of a constraint on the Court's decisions in this domain. The Court can afford—in the judicial capacity sense—to adopt vague standards invalidating government action that in other areas of executive power would invite an unsustainable volume of litigation.[284]

For illustrative purposes, consider Justice Jackson's three-part framework. As case law reveals, application of Justice Jackson's malleable framework produces uneven results.[285] This, of course, creates uncertain-

[280] See supra Parts III and IV.

[281] High-stakes actors exert disproportionate influence over the administrative state. See Jason Webb Yackee & Susan Webb Yackee, A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy, 68 J. Pol. 128, 135 (2006). In addition, the Court has broadly recognized standing for regulated entities and individuals. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992) (noting that individuals and entities that are "the object of" a regulation will almost always have standing to challenge that regulation); see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 183–87 (2000) (recognizing broad standing for regulatory beneficiaries); FEC v. Akins, 524 U.S. 11, 21 (1998) (same).

[282] See, e.g., *Dames & Moore*, 453 U.S. at 661 ("[T]he decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases.").

[283] See, e.g., Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1155 (2013); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974); United States v. Richardson, 418 U.S. 166, 179–80 (1974).

[284] Of course, this is in part because the Court has interpreted the Constitution so as not to call into question the vast majority of presidential actions in the sphere of foreign affairs and national security. At some point quite far from the status quo, aggressive judicial intervention in this domain might produce enough litigation to implicate the constraints of judicial capacity, especially if it extended to the day-to-day administration of the military and conduct of diplomatic relations. But unlike the other domains of executive power we have discussed, no mainstream commentator argues for such a significant departure from judicial deference. Put differently, all of the major controversies over judicial deference in foreign and military affairs occur within a sufficiently narrow band that judicial capacity little constrains the Court's options.

[285] See supra Section V.B.

ty with respect to future decisions. Uncertainty breeds litigation. Application of such a vague standard in a high-stakes and high-volume domain—say the nondelegation doctrine—would almost certainly generate an overwhelming volume of litigation. This surge in litigation would pressure the Court to sharpen the framework significantly to reduce uncertainty or abandon the standard altogether. However, in the area of foreign affairs and national security, the level of uncertainty created by such a vague standard does not threaten the Court's limited capacity, since the absolute volume of litigation is fixed at a relatively low level. The Court's use of vague standards in this low-volume domain is quite consistent with the judicial capacity model.

Judicial capacity cannot, of course, explain the Court's decision to rely on vague standards to invalidate executive action. Capacity constraints do not in any way force the Court to cast its decisions in this doctrinal form. Rather, the absence of significant capacity constraints explains why vague standards are an option in this domain, while they collapse into rules of categorical deference in other executive power domains that are both high-stakes and high-volume. A similar point holds with respect to deference. The Court has certainly not always deferred to the President in foreign affairs, as *Youngstown*, *Medellin*, *Boumediene v. Bush*,[286] and other decisions illustrate. But to the extent that the conventional wisdom is true[287] and the Court's decisions in this area have been deferential, the judicial capacity model suggests that it is for reasons other than capacity, such as the court's relative incompetence.[288]

[286] 555 U.S. 723 (2008).

[287] See Julian Ku & John Yoo, *Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch, 23 Const. Comment. 179, 194 (2006) ("Well-settled doctrines require the deference of courts to executive interpretations of the certain laws relating to foreign affairs.").

[288] See, e.g., Koh, supra note 257, at 1316 ("Additional impetus to defer derives from legitimate judicial concerns about the separation of powers and judicial incompetence to decide particular foreign affairs cases."); Ku & Yoo, supra note 287, at 199 ("[C]ourts have access to limited information in foreign affairs cases and are unable to take into account the broader factual context underlying the application of laws in such areas."); Eric A. Posner & Adrian Vermeule, The Credible Executive, 74 U. Chi. L. Rev. 865, 890 (2007) ("When the executive says that resolving a plaintiff's claim would require disclosure of 'state secrets,' with dangerous consequences for national security, judges know that . . . they have no easy means to assess whether the claim is credible." (footnote omitted)); cf. Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting) ("In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal.").

The bottom line is that the Court has approached national security and foreign affairs cases differently than executive power cases in other, higher volume domains. In the former, the Court has frequently employed indeterminate standards to invalidate government action. In the latter, it has never—or almost never—done so. The judicial capacity model provides a straightforward explanation. Judicial ideology, fear of political reprisal, judicial incompetence, and legal principle can all explain some other aspects of the Court's decisions, but they cannot explain why the Court is only willing to employ stringent, indeterminate standards in low-volume domains. Judicial capacity can.

VI. LESSONS

Our discussion to this point has been largely retrospective. The judicial capacity model helps to explain several persistent puzzles in the Supreme Court's past executive power decisions. This is important in its own right and also because it provides additional empirical support for the model's descriptive and predictive claims. Together with the evidence amassed in prior work, that support is quite substantial and spans many of the most important domains of constitutional law. These include the commerce[289] and spending powers,[290] equal protection,[291] substantive due process,[292] and regulatory takings,[293] as well as the executive power domains we have discussed here.

The implications of our analysis, however, run significantly deeper. Indeed, applying the judicial capacity model to the constitutional law of executive power yields several larger insights of great interest to constitutional law and theory. This Part discusses four that we believe to be especially important.

A. Ought Implies Can

Perhaps the most obvious implication of our judicial capacity analysis is that normative constitutional arguments must take account of institutional constraints on the judiciary. In particular, arguments that the Court should more stringently police congressional delegation or interference

[289] Coan, Judicial Capacity, supra note 18, at 443–46.
[290] Coan, Conditional Spending Paradox, supra note 18, at 360–66.
[291] Coan, Judicial Capacity, supra note 18, at 436–37.
[292] Id. at 438 n.44.
[293] Id. at 436–38.

with presidential administration must take account of judicial capacity, which sharply constrains both the extent to which the Supreme Court can intervene in these areas and the means at its disposal for doing so. In a phrase, ought implies can. Proponents of aggressive judicial review ignore this simple truth at their peril.[294]

Philip Hamburger's recent broadside against American administrative law is an interesting example.[295] Alternately hailed as "brilliant"[296] and dismissed as "disheartening [and] irresponsible,"[297] Hamburger's massive, hyperbolic, and richly historical argument is centrally concerned with delegations of legislative power. Perhaps more than any other feature of the American administrative state, Hamburger identifies such delegations as the root of a modern revival of absolute power.[298] True to his hair-on-fire rhetoric, Hamburger is not content to argue for a more rigorous nondelegation doctrine. As he sees it, the problem is not merely that administrative agencies wield too much power to "fill up [statutory] details"[299] or that the "intelligible principles" governing congressional delegations are too broad. The problem is that Congress is permitted to delegate the power to make binding rules—defined as rules that alter the legal rights and obligations of private parties—*at all*. To remedy this despotic state of affairs, as he sees it, Hamburger calls on the courts to invalidate all such delegations, as well as the regulations flowing from them, which he dubs "extralegal legislation."[300]

This prescription would obviously unsettle an extraordinary volume of legislation and administrative regulations. There must be thousands of congressional statutes that vest executive or independent agencies with

[294] Another way to look at this problem is as an example of what Adrian Vermeule and Eric Posner have called "the inside/outside fallacy." Eric A. Posner & Adrian Vermeule, Inside or Outside the System?, 80 U. Chi. L. Rev. 1743, 1788–90 (2013). To the extent that proponents of more aggressive judicial review identify judicial weakness as the problem, they risk contradicting themselves if they do not attend to the causes of that weakness in prescribing judicial solutions.

[295] Philip Hamburger, Is Administrative Law Unlawful? (2014).

[296] Gary Lawson, The Return of the King: The Unsavory Origins of Administrative Law, 93 Tex. L. Rev. 1521, 1521 (2015).

[297] Adrian Vermeule, No, 93 Tex. L. Rev. 1547, 1566–67 (2014) (reviewing Philip Hamburger, Is Administrative Law Unlawful? (2014)).

[298] Hamburger, supra note 295, at 508.

[299] See Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

[300] Hamburger, supra note 295, at 31–32.

the authority to issue binding rules[301] and hundreds of thousands of agency regulations adopted in the exercise of this authority.[302] Yet Hamburger, like many scholars of executive power, barely pauses to consider the "concerns about . . . judicial practicalities"[303] that his approach would raise. Had he done so, he would have encountered a powerful objection grounded in judicial capacity, as well as an interesting potential response.

The objection is straightforward. Without abandoning its commitment to minimum professional standards and uniformity, the Supreme Court lacks anything like the bandwidth necessary to aggressively review so much legislation and regulation in an area where it would feel strongly compelled to decide a large fraction of cases itself. This is one of several reasons "[i]t would be the easiest thing in the world to dismiss Hamburger's book with the glib observation that it will change nothing."[304]

That would be too quick. Hamburger's proposed rule is far more hard-edged and categorical than most proposed versions of the nondelegation doctrine, which generally require courts to figure out how much delegation is too much. As already discussed, this is a difficult, uncertain, and fact-sensitive enterprise. Like Hamburger's approach, it would cast a pall over a wide swath of legislation and regulation. But it would also produce a great deal of uncertainty, increasing the volume of litigation and producing divergent rulings in the lower courts that the Supreme Court would feel compelled to resolve. By contrast, Hamburger's proposal is relatively straightforward, predictable, and categorical. It would merely require courts to identify which delegations and regulations purport to bind private parties, a far more clean-cut inquiry. Unlike other categorical rules we have encountered, Hamburger's approach would not insulate much governmental action from challenge, but it would produce far less uncertainty and might well be enforceable on lower courts largely through summary decisions.

[301] Thousands of federal statutes vest between 160 and 200 entities with rulemaking authority. See Farina, supra note 5, at 397 & n.168 ("[T]housands of statutes delegate regulatory power to hundreds of administrative units with formal policymaking authority.").

[302] As of 2013, the Code of Federal Regulations contained 200 volumes, spanning 175,000 pages. See Code of Federal Regulations: Page Breakdown – 1975 through 2013, Federal Register (Oct. 29, 2014), https://www.federalregister.gov/uploads/2014/04/CFR-Actual-Pages-published1-2013.pdf [https://perma.cc/3T48-4VE7].

[303] Hamburger, supra note 295, at 492.

[304] Vermeule, supra note 297, at 1553.

None of this is to endorse Hamburger's argument. Indeed, we tend to believe the judicial capacity objection is more powerful than the response. We also have many other reservations about Hamburger's project unrelated to judicial capacity. But for present purposes, the merits of that project are unimportant. The crucial point is that the judicial capacity model illuminates both the significant constraints on judicial action and the affirmative capacities of the Court to act. Any approach to executive power—or constitutional law generally—that ignores judicial capacity is missing something quite important.

Indeed, the judicial capacity model allows us to make some significant general predictions about the future direction of the Court's executive power decisions. As we demonstrated in Parts II and III, congressional delegation and presidential administration are both high-stakes and high-volume domains. We therefore doubt that efforts to reinvigorate the nondelegation principle or unitary executive theory will meet with much success. They would simply produce too much litigation. If these efforts have any chance, however, it likely depends on the ability of their proponents to formulate categorical rules that clearly insulate most government actions from scrutiny, while providing clear notice to prospective parties and clear guidance to lower courts. The *INS v. Chadha* and *Clinton v. City of New York* decisions are good examples of this.

Conversely, opponents of expanded judicial scrutiny should focus their efforts on demonstrating the crudity of categorical rules—their inevitable over- and under-inclusiveness—and their consequent substantive undesirability. To make the point more concrete, do proponents of the unitary executive theory wish to give up the independence of the Federal Reserve and administrative law judges, along with that of the PCAOB and the FTC? Do opponents of delegation wish to give up the EPA's authority to regulate arsenic in drinking water along with its authority to regulate greenhouse gases? Again, our point is not to endorse any particular side in these debates. It is simply to demonstrate the ways in which judicial capacity alters the context and confines of normative constitutional debate.

B. Capacity and Competence

In addition to defining the realm of the possible, the judicial capacity model has important implications for the competence of the Supreme Court in high-stakes and high-volume domains. In this way, the model

substantially enriches standard accounts of judicial competence, which receive significant attention in the executive power literature,[305] and to a lesser extent Supreme Court jurisprudence.[306] As to congressional delegation, commentators advocating judicial deference routinely emphasize the Supreme Court's comparative incompetence to decide how much delegation is too much.[307] As to presidential administration, advocates of deference frequently make very similar arguments.[308] As Justice Breyer puts it in his *Free Enterprise Fund v. PCAOB* dissent, "Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration, and the manner in which power, including and most especially political power, operates in context."[309]

These arguments, however, are chronically undertheorized. It is true that Supreme Court Justices, in the main, are less experienced than legislators with the day-to-day operations of both Congress and the administrative state.[310] They also lack anything like the staff or budget that Congress and the President can devote to the initial question of delegation and the secondary question of how broadly to construe or wield delegated authority (or how much control the President ought to exercise, and through what avenues, over the administrative state).[311] But Justices are also substantially insulated from many of the political pressures that might cause legislators and presidents to use—or ignore—their expertise

[305] See, e.g., Cass R. Sunstein & Adrian Vermeule, Interpretations and Institutions, 101 Mich. L. Rev. 885, 886 (2003); John Yoo, Courts at War, 91 Cornell L. Rev. 573, 597–600 (2006).

[306] See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting); United States v. Armstrong, 517 U.S. 456, 465 (1996); Rostker v. Goldberg, 453 U.S. 57, 65 (1981); Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

[307] See, e.g., John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 241–42 ("[T]he Court's reluctance to invalidate statutes on the basis of the nondelegation doctrine reflects serious concerns about its own competence . . . ."); Sunstein, Nondelegation Canons, supra note 43, at 321 ("[J]udicial enforcement of the nondelegation doctrine would raise serious problems of judicial competence . . . .").

[308] See, e.g., Huq, supra note 16, at 6 ("Courts simply have no way of knowing in advance what effect their intervention will have on the relevant constitutional good.").

[309] Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3169 (2010) (Breyer, J., dissenting).

[310] Id.; accord Komesar, supra note 39, at 139; Huq, supra note 16, at 72 ("There is every reason to expect that the political branches have information about these factors that courts systematically lack.").

[311] See Vermeule, supra note 13, at 268.

and fact-finding resources against the public interest.[312] Justices also have access to the entire legislative record, and much additional factual input in the form of amicus briefs, all tested through an adversarial process in which the marginal value of special interest expenditures is very likely lower than it is in the legislative and administrative processes.[313]

None of this is to suggest that the judiciary is necessarily more competent than Congress and administrative agencies, but the case is closer and more complicated than the conventional wisdom assumes. At least it would be if the judiciary were free to spend unlimited time and energy considering every delegation and presidential administration issue on a case-by-case basis. But of course, the Supreme Court is not free to take this approach—at least not in high-stakes and high-volume domains—as the judicial capacity model demonstrates. Instead, it is forced to choose between hard-edged, categorical limits on governmental action and highly deferential standards. The former are inevitably over- and under-inclusive relative to their underlying purposes and may well make things worse rather than better. The latter tend in practice to collapse into rules of categorical deference, which are the practical equivalent of no judicial review at all.[314] This limited and unattractive menu of options is certainly not the only reason to question the competence of the judiciary in the context of congressional delegations and interference with presidential administration. But it provides much needed ballast for the chronically under-theorized conventional wisdom.

This ballast is highly relevant both to the explanatory power of the judicial capacity model and to normative debates over the appropriate scope of judicial review in the context of executive power. As to the former, the relative incompetence of the judiciary is a frequently cited explanation for judicial deference[315] and a less frequently cited explana-

[312] See Coan, Judicial Capacity, supra note 18, at 451; Douglas Laycock, A Syllabus of Errors, 105 Mich. L. Rev. 1169, 1172–77 (2007); cf. Komesar, supra note 39, at 69 (explaining the importance of participation as opposed to intent or knowledge in driving political process decisions).

[313] See Thomas W. Merrill, Institutional Choice and Political Faith, 22 L. & Soc. Inquiry 959, 962 (1998); Webb Yackee & Webb Yackee, supra note 281, at 137 (demonstrating the influence of special interests in the administrative process).

[314] See Coan, Judicial Capacity, supra note 18, at 446.

[315] See, e.g., Koh, supra note 257, at 1316 ("Additional impetus to defer derives from legitimate judicial concerns about the separation of powers and judicial incompetence to decide particular foreign affairs cases."); Posner & Sunstein, supra note 16, at 1193 ("In defending [*Chevron* deference], the Court referred to two points about institutional competence: as

tion for judicial adherence to bright-line rules.[316] Even if true, these arguments do not explain the Court's greater adherence to these approaches in high-stakes and high-volume domains.[317] But the role of judicial capacity in undermining judicial competence suggests that these explanations of judicial decision making are not competing but complementary. It may well be, in some contexts, that the Court is hesitant to aggressively review government action due to doubts about its own competence. But if those doubts are a product of the Court's limited capacity—at least in part—this counts for the judicial capacity model, not against it.

As to normative debates, the comparative competence of the judiciary is certainly one important factor—perhaps the most important factor—to consider in determining the optimal scope of judicial review, in the context of executive power or otherwise.[318] But if that competence is substantially undermined by the limits of judicial capacity, this is not a reason to ignore judicial capacity in favor of judicial competence. Rather, it is an important reason to consider judicial capacity in any careful normative analysis. Indeed, the influence of capacity constraints on the competence of judicial decision making is a powerful independent reason for attending to judicial capacity, quite apart from its explanatory power.

C. Capacity and Independence

The judicial capacity model also enriches standard accounts of judicial independence, which like judicial competence, receives significant attention in the executive power literature. By judicial independence, we mean the power of the Supreme Court to work its will against the tide of dominant political forces. To the limited extent that the executive power literature attempts to explain rather than evaluate the Court's executive power decisions, it emphasizes the Court's reluctance to provoke a back-

compared with executive agencies, judges lack expertise and are not politically accountable.").

[316] Posner & Sunstein, supra note 16, at 1193.

[317] See supra Parts II and III.

[318] See Komesar, supra note 39, at 255 ("Ultimately, the difficult comparison between the political and adjudicative processes molds the patterns of constitutional law and the terms of constitutional jurisprudence.").

lash that would threaten its institutional position or prestige.[319] This is consistent with the conventional wisdom that the Court anticipates the reaction of the political branches and public opinion in reaching its decisions and behaves strategically to avoid costly retaliation.[320]

Like the conventional wisdom about judicial competence, however, this understanding of judicial independence is chronically undertheorized. For example, Barry Friedman relies on the Court's institutional memory of costly retaliations past to explain the Court's generally majoritarian decisions.[321] But the examples of such retaliations are so few and far between that it seems implausible that they would strike substantial fear into the hearts of rational Justices.[322] Other possible mechanisms for explaining the Court's pattern of deference are somewhat more plausible. The politics of judicial appointments in particular almost certainly ensures some rough congruence between the views of the court and the political branches.[323] But, as Richard Pildes has persuasively shown, neither the appointments process nor any other mechanism identified in the literature appears to constrain the court very strongly or reliably.[324] Nor, we would add, do any of these mechanisms explain the Court's substantial willingness to invalidate governmental actions when it is possible to do so in the form of a categorical rule[325] or in low-volume domains like national security and foreign affairs, where the potential volume of litigation is insufficient to threaten the Court's limited capacity budget.[326]

Again, none of this is to question the conventional wisdom that the Court worries about political backlash to its decisions. But the question is closer and more complicated than the conventional wisdom assumes. Enter the judicial capacity model, which supplies an important and novel reason for the Court's reluctance to challenge the political branches or popular majorities. That reason is straightforward. Any decision that

[319] See, e.g., Barry Friedman, The Will of the People 374–76 (2009); Gordon Silverstein & John Hanley, The Supreme Court and Public Opinion in Times of War and Crisis, 61 Hastings L.J. 1453 (2010).

[320] See Pildes, supra note 46, at 103–06, 114–17 (discussing the majoritarian thesis).

[321] Friedman, supra note 319, at 376 ("Now that the justices and the public understand how things work, the system tends to rest in a relatively quiet equilibrium.").

[322] See Pildes, supra note 46, at 133–39.

[323] See Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045, 1068 (2001).

[324] See Pildes, supra note 46, at 126–42. Pildes also makes a strong case that some of these mechanisms may be growing less potent with time. Id. at 157.

[325] See supra Part IV.

[326] See supra Part V.

constrains governmental power increases the expected benefits of constitutional litigation. And any decision that does this in the teeth of strong political or public opposition is overwhelmingly likely to involve a high-stakes domain. Under these circumstances, judicial capacity is strongly likely to constrain the Court to defer to the political process, unless the Court is able to cast its decision in the form of a categorical rule or unless the domain in question is a low-volume one like national security and foreign affairs. Judicial capacity is certainly not the only mechanism that might cause the Court to avoid clashes with the political process. But, as with judicial competence, it provides much needed additional support for the chronically under-theorized conventional wisdom about judicial independence.

Again, this support is highly relevant both to the explanatory power of the judicial capacity model and to normative debates over the appropriate scope of judicial review in the context of executive power. As to the former, the reluctance of the judiciary to challenge dominant political forces is frequently cited as an explanation for judicial deference.[327] Even if true, these arguments do not explain the Court's greater willingness to challenge political forces when it can do so through hard-edged categorical rules[328] or in low-volume domains.[329] But the role of judicial capacity in undermining judicial independence suggests that these explanations of judicial decision making are not competing but complementary. It may well be, in some contexts, that the Court is hesitant to aggressively challenge dominant political forces. But if that reluctance is, at least in part, a product of the Court's limited capacity, this counts for the judicial capacity model, not against it.

As to normative debates, the point is more straightforward. Once again, ought implies can. If judicial capacity constraints prevent the Court from meaningfully challenging political forces in high-volume and high-stakes domains, would-be reformers should probably bark up a different tree. At a minimum, they should focus their efforts on formulating attractive categorical rules that cleanly insulate most governmental action from constitutional challenge. Opponents of aggressive judicial review should do the opposite.[330]

[327] See, e.g., Friedman, supra note 319, at 376.
[328] See supra Part IV.
[329] See supra Part V.
[330] See supra Section VI.A.

D. Formalism vs. Functionalism

Last but not least, the judicial capacity model helps to resolve a longstanding puzzle in the theoretical literature on separation of powers. The principal divide among separation of powers theorists is between formalists and functionalists.[331] This dichotomy is also the one that most theorists have used to categorize Supreme Court decisions on separation of powers. In a nutshell, formalism is "committed to rule-based decisionmaking," while functionalism "would resolve structural disputes 'not in terms of fixed rules but rather in light of an evolving standard designed to advance the ultimate purposes of a system of separation of powers.'"[332]

As should be apparent from this description, neither formalism nor functionalism has any intrinsic bias toward upholding or invalidating government action. Formalist doctrines can be strict or lenient and so can functionalist doctrines. For example, "restrictions on the removal of executive officers are per se valid under the Necessary and Proper Clause" is a formalist rule but extremely deferential to Congress. By contrast, "the President must be free from any outside interference that prevents him from exercising full and effective unitary control over the administration" is a functional rule but an extremely stringent one. In actual practice, however, scholars of separation of powers agree that the Court nearly always employs a formalist approach to invalidate government action and a functionalist approach to uphold it.[333]

Why should this be? To repeat, there is nothing intrinsic to formalism or functionalism that biases either toward upholding or invalidating gov-

[331] See V.F. Nourse, Toward a New Constitutional Anatomy, 56 Stan. L. Rev. 835, 842 (2004).

[332] M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127, 1142 (2000) (quoting Thomas W. Merrill, The Constitutional Principle of Separation of Powers, 1991 Sup. Ct. Rev. 225, 231); see also McCutchen, supra note 92, at 5 (noting that the Court has switched back and forth between formalism and functionalism in its separation of powers jurisprudence).

[333] See Magill, supra note 332, at 1145 ("[O]pinions characterized as functionalist . . . have invariably sustained the challenged arrangement."); Merrill, supra note 332, at 226 ("The formal theory is regularly used in evaluating (and invalidating) attempts by Congress to exercise governmental power by means other than the enactment of legislation; the more elastic functional approach is favored in reviewing (and approving) duly-enacted legislation that regulates or reallocates the functions performed by the other two branches."); Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 Duke L.J. 449, 450 (1991) (discussing the Court's "split personality" in vacillating between formalist and functionalist methods).

ernmental action. Nor does the existing literature offer a good explanation. The judicial capacity model, however, goes a long way toward clearing up the mystery. The functionalist method is, by definition, an open-ended inquiry that must be applied on a case-by-case basis. Applied vigorously, such an indeterminate approach would cast a pall of constitutional doubt over a wide swath of governmental action. In most areas of executive power, the resulting volume of litigation would be immense. From the standpoint of judicial capacity, it is therefore no surprise that the Court has applied its functionalist method as a rule of near-categorical deference. Put simply, functionalism without deference would overwhelm the Court's modest capacity.

By contrast, formalist decisions are, by definition, cast in the form of hard-edged rules. These rules generally only threaten a small fraction of government action, cleanly insulating the rest from constitutional doubt. Moreover, their clarity reduces uncertainty, thereby reducing both the volume of potential litigation and the likelihood of division among the lower courts. From the standpoint of judicial capacity, it is therefore no surprise that the Court has employed a formalist approach in virtually every executive power case in which it has invalidated government action.[334] Any other approach, as we have already said, would overwhelm the Court's capacity.

VII. CAVEATS AND CLARIFICATIONS

In the interest of readability, the preceding discussion has omitted several subtle but important nuances and caveats. One of us has explained several of these at length elsewhere. Most notably, the judicial capacity model does not assume that the Supreme Court is infallible in assessing its own capacity or in assessing the capacity impacts of its decisions. But when the Court fails, the system responds, forcing a change of course.[335] Nor does the judicial model purport to predict the outcome in every case; it predicts general trends in the Court's decision making.[336] To avoid confusion, we emphasize several additional caveats and clarifications here.

[334] *Chadha* and *Clinton* are prototypical examples. See Magill, supra note 332, at 1142 (characterizing *Chadha* and *Clinton* as "the most formalist" decisions).

[335] See Coan, Judicial Capacity, supra note 18, at 453–54.

[336] Id. at 453.

First, we do not claim that judicial capacity is the only influence or constraint that affects Supreme Court decision making. Rather, the Court's limited capacity is an important constraint that shapes the context and confines in which all other influences operate. Of particular importance, we do not quarrel with the dominant political science view that judicial ideology is the best predictor of how Justices vote in deciding cases.[337] Our focus is on why the Court avoids deciding particular types of cases and, in those cases it decides, how considerations of judicial capacity influence the doctrinal form—as opposed to the ideological result—of the Court's opinions.

Free Enterprise Fund v. PCAOB is a good example.[338] The majority Justices may have voted the way they did because of their conservative ideological commitment to a unitary executive (or even their conservative hostility to the mission of the PCAOB), but ideology does not explain the form their decision took. Specifically, it does not explain their endorsement of a categorical rule against two-layer removal restrictions, rather than a more functional standard. Nor does it explain their decision to ignore one-level removal restrictions and all non-removal forms of congressional interference with presidential administration. These are hugely consequential elements of the decision that political science models overlook largely because they are difficult to count.[339] The judicial capacity model, by contrast, is keenly attuned to these softer, more qualitative judicial outcomes and goes a long way toward explaining them.

Second, we do not claim that the influence of judicial capacity on Supreme Court decision making is necessarily conscious. Rather, we believe it affects the boundaries of the thinkable. Consider, again, the example of *PCAOB*. A decision requiring serious review of all interference with presidential administration would have produced (a) an overwhelming volume of litigation that (b) the Court would have felt compelled to review. The same would be true of a rigorously enforced nondelegation doctrine. Whether the Justices consciously, semi-consciously, or subconsciously conceive of these issues in terms of judicial capacity, we feel confident they would consider such results unthinkable. As a result,

[337] See supra note 79. This is not true of national security and foreign affairs, where the relatively low volume of potential litigation has permitted the Court to apply a functionalist approach more stringently.

[338] 561 U.S. 477 (2010).

[339] See supra note 79.

we should expect them to pursue their preferred policy outcomes through doctrinal forms designed to avoid this sort of capacity overload. Parts II through V show that this assumption helps to explain patterns in the Court's past decisions that no other plausible alternative can.

Third, when we say that the judicial capacity model "explains" the Supreme Court's decisions, we do not mean that it is necessarily a but-for cause of any particular decision. In many cases, multiple forces will push the Court toward deference or categorical rules. Judicial capacity is one of them, and in the high-volume and high-stakes domains that we focus on, we believe it is fully sufficient to explain the pattern of the Court's decisions. Of course, that does not mean it is necessary to explain that pattern. In judicial behavior, as elsewhere, joint sufficient causation is a familiar phenomenon. In cases where some other factor is also a sufficient explanation for the Court's decisions—say ideology, judicial timidity, or judicial humility—judicial capacity may be doing little or no independent causal work.

This troubles us little for several reasons. To begin with, it suggests a pressing need to disentangle these various causes, especially judicial capacity, which has received far less attention than most others. Additionally, a joint sufficient cause that does no independent work in the presence of other such causes becomes very significant when those causes erode or disappear. As we discussed earlier, this is a very real possibility with some other potential explanations for judicial deference.[340] Finally, the judicial capacity model is the best explanation for the Court's greater use of deference and categorical rules in high-stakes and high-volume domains. It is also the best explanation for the Court's greater use of standards to uphold, and categorical rules to invalidate, government action. In other words, it explains a chunk—or two—of the variance that no other plausible contender can.

Fourth, our argument extends only to the modern era, which we define as extending from President Franklin Roosevelt's first term forward. During that time, the executive power issues we discuss—in particular, the nondelegation doctrine and unitary presidential administration—clearly qualify as both high-stakes and high-volume domains. Before FDR's first term, different norms governed Supreme Court decision

[340] See supra Section VI.B.

making[341] and, of course, the federal administrative state was much smaller.[342] These differences complicate the predictions of the judicial capacity model, requiring a deeper investigation of these earlier periods than we have undertaken.

Fifth, we do not claim that the Supreme Court's current approach to judicial capacity is inevitable or hard-wired. The judicial norms that underlie judicial capacity vary in content and degree. Indeed, these norms evolve over time, frequently in response to changing demands on judicial capacity.[343] What is inevitable and unavoidable is the trade-off between the Court's caseload and its commitment to minimum professional standards and reasonable uniformity. Theoretically, this trade-off could be managed in many different ways.[344] But the Court's commitment to minimum professional standards and uniformity is sufficiently deep, long-standing, and invariant across the political spectrum that we expect our judicial capacity model to have robust predictive power for some time to come.

Sixth, the judicial capacity model should, in theory, be quantitatively testable. In practice, however, such testing is extremely difficult because the dependent variables—deference and doctrinal form—are so context-specific that they are difficult to specify in coding instructions that can be applied consistently across constitutional domains. The role of lower courts in determining the practical effect of Supreme Court rulings fur-

[341] See, e.g., Robert Post, The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court, 85 Minn. L. Rev. 1267, 1274–75 (2001).

[342] See Pierce et al., supra note 58, at 31 ("The number of federal agencies and their involvement in private markets grew dramatically during President Roosevelt's first term . . . .").

[343] See Lawrence M. Friedman, Legal Rules and the Process of Social Change, 19 Stan. L. Rev. 786, 808 (1967) ("Abandonment of the judicial system, or at least of traditional judicial procedures, has indeed been historically one major social response to the pressures of increasing business."); Huang, supra note 33, at 1110 (empirically demonstrating an example of this process in action).

[344] In future work, we are very interested in exploring how different national and subnational court systems manage this trade-off. We expect to find many similarities with the U.S. experience but also many differences. The Brazilian Supreme Federal Court, for example, appears to be far less deferential and to rely on fewer categorical rules than the U.S. Supreme Court. To do so, however, it necessarily tolerates significant disuniformity in the decisions of lower courts and delegates far greater decision-making authority to administrative staff. See Marcelo Neves, Institutional Limits of the Supreme Federal Court Practice Enlightened by the Brazilian Constitution, Lecture at the International Seminar on Institutional Theory at the National Federal University of Rio de Janeiro (Nov. 5, 2014) (transcript on file with author).

ther complicates matters.[345] One of us has spent substantial time working with political science colleagues to define these variables in a way that would permit reliable coding. Thus far, those efforts have been unsuccessful, but this is certainly an important avenue of future inquiry. In the meantime, systematic qualitative work of the sort we have undertaken here has an important role to play in capturing institutional constraints on judicial decision making that manifest themselves too subtly for large-N quantitative analysis.

Seventh, and most generally, we emphasize our humility in the face of contingency and causal complexity. In the preceding discussion and our prior work, we have shown that the judicial capacity model's premises are plausible and well-supported. We have also shown that the Supreme Court's decisions are consistent with the model's predictions across a broad range of important constitutional domains and that the model is capable of explaining significant features of those decisions that no other plausible alternative can. Finally, we have shown that the model, if correct, has substantial implications for judicial competence, judicial independence, and other deep questions of constitutional theory.

None of this means that we have proved the model correct. The world is a complicated place, full of chance outcomes and unobservable variables. We could be wrong in attributing any logic at all to the Court's decisions. Or we could be wrong in some other way. Until we are so proven, however, we believe judicial capacity deserves a central place on the agenda of constitutional theory.

CONCLUSION

The budget of the United States executive branch is roughly 500 times greater than that of the judicial branch, while its workforce is more than fifty times greater.[346] Given these disparities, it is no surprise that the capacity limits of the judiciary shape the Supreme Court's decisions and limit its role in policing executive power in important ways. The judicial capacity model gives form and rigor to this commonsense intuition, using it to make definite predictions and to explain puzzling pat-

[345] Coan, Conditional Spending Paradox, supra note 18, at 380 ("Indeed, the full import of a ruling remains uncertain until it is fleshed out in subsequent decisions of the lower courts . . . .").

[346] See supra notes 3, 7, 9–10.

terns in the Court's decisions across a range of executive power domains.

The payoffs are substantial. The model explains why the Supreme Court has historically deferred to congressional delegations and to congressional interference with presidential administration, despite significant ideological temptations to intervene. It also explains the few areas in which the Court has been willing to act aggressively, as well as the one area in which the Court has employed relatively indeterminate standards to invalidate government action. In addition to offering these backward-looking explanations, the judicial capacity model defines the boundaries of the possible in future executive power cases. Last but not least, the judicial capacity model sheds light on some of the most significant issues in constitutional theory.

For all of this, the study of judicial capacity remains in its infancy. Many substantive areas have yet to be explored. The political and legal dynamics that distinguish high-volume and high-stakes domains require further theoretical and empirical investigation. So does the role of lower courts in shaping the practical impact of Supreme Court decisions. Comparative study of judicial capacity is an exciting but largely uncharted frontier, with the potential to illuminate U.S. and foreign constitutional regimes alike. Finally, quantitative testing remains a pressing, if daunting, priority. We look forward to carrying the discussion forward, hopefully with the assistance and collaboration of the constitutional theory field at large.